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No. -

In The

Supreme Court of the United States

October Term, 1993

HOWARD R. RELIN, Individually,

Petitioner,

vs.

MELINDA C. FRANK,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Relin's qualified immunity defense to Frank's 42 U.S.C. §1983 suit should be decided on summary judgment under an objectively reasonable standard or remanded for trial because his subjective good faith is in doubt?

Whether Relin individually is the same party as Relin in his official capacity so Frank's amended complaint adding him individually after the statute of limitations had run relates back under Fed. R. Civ. P. 15(c)?

LIST OF PARTIES

1. Howard R. Relin, individually.
2. Monroe County, State of New York: the real party in interest in the suit against Howard R. Relin, in his capacity as the Monroe County District Attorney.
3. Melinda C. Frank

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Frank v. Relin, No. 86-Civ-0371L (W.D.N.Y. September 4, 1991), attached as Appendix C.

Frank v. Relin, 719 F.Supp. 139 (W.D.N.Y. 1989), attached as Appendix D.

GROUNDS FOR JURISDICTION

On July 28, 1993, in *Frank v. Relin*, 1 F.3d 1317 (2d Cir. 1993), the United States Court of Appeals for the Second Circuit vacated the August 24, 1992 decision and order of the United States District Court for the Western District of New York, and remanded for further proceedings. By order dated and filed September 15, 1993, petitioner's petition for rehearing and suggestion of in banc consideration was denied.

This Court has jurisdiction to review the decision in *Frank v. Relin*, 1 F.3d 1317 (2d Cir. 1993) under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The statutory provisions implicated in this Petition for a Writ of Certiorari.

U.S. Const. Amend. 1

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Fed. R. Civ. P. 15(c)

"(c) **Relations Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

STATEMENT OF THE CASE

On September 13, 1985, Monroe County District Attorney Howard R. Relin, ("Relin") was summoned to the chambers of New York Supreme Court Justice Kennedy ("Justice Kennedy"). Justice Kennedy told Relin he had been informed that an assistant district attorney might have mishandled potentially exculpatory evidence in the Larson homicide case. Prior to this meeting with Justice Kennedy, Relin knew nothing about the alleged mishandling of exculpatory evidence.

Relin, surprised by what he heard, returned to his office to investigate the matter. Relin subsequently learned that Louis P. Pilato ("Pilato") had talked to Justice Kennedy about the Larson case after a conversation with Melinda C. Frank ("Frank"). Frank was employed in the Monroe County District Attorney's Office as a "victim-witness coordinator". Pilato, an assistant district attorney, was in charge of the office's investigative unit but had no supervisory responsibility for the victim-witness bureau.

Frank testified she told First Assistant District Attorney Charles Siragusa ("Siragusa") that a witness placed Larson at the victim's home a day before the murder and another witness said Larson was on drugs. According to Frank, Siragusa told her not to bring the witnesses in because it would only help the defense. Frank wanted to talk to someone about Siragusa's failure to see these witnesses and testified that Relin and Mary Ann Hawco, Second Assistant District Attorney, were out of the office. She testified that since her immediate supervisor, George Sofia ("Sofia") was tied up, she went to Pilato.

Frank told Pilato about the witnesses and Siragusa's comment and asked Pilato not to do anything before he let her know. Pilato called the information *Brady* [*Brady v. Maryland*, 373 U.S. 83 (1963)] material, although Frank had said nothing about any conversations between Siragusa and Larson's lawyer. Contrary to

Frank's request, Pilato went to Justice Kennedy about the witnesses without notifying her. Some time after Frank learned of Pilato's actions, she called Siragusa and told him what Pilato had done.

Relin spoke with Frank and inquired why she had not expressed her concerns to her immediate supervisor or Relin, rather than Pilato. According to the Second Circuit: "He told Frank 'she had made the most serious type of error in judgment' and that he planned to discuss her performance with the members of his senior staff" (A 7).[1]

On Friday, September 20, 1985, Frank was called to Relin's office and asked to resign. She described the meeting as follows:

> "They told me that they felt I should not have gone to Mr. Pilato because there were problems between Mr. Pilato and Mr. Siragusa and Mr. Pilato was out to get Mr. Siragusa, and they also told me that George and Howard, the three of them told me they could continue to work with me without any problem, but that other district attorneys in the office did not feel that they could trust me at that point."

Frank testified that Relin believed the attorneys would not use the Witness Center if she was present, and she was being asked to resign because of the ramifications.

Relin stated he was not concerned with the content of Frank's communication to Pilato. He was concerned with the effect Frank's discussion of one prosecutor's case with another prosecutor, instead of with himself or her supervisor, would have on the efficient operation of his office. About Frank's conduct, Relin testified:

> "I think that the reason I was very upset with her as well was because that she, if anyone, knew the way to communicate with the office . . . I had many conversations with her dur-

[1] A letter in parenthesis followed by a number refers to a page in the Appendix.

> ing the course of her employment. It amazed me that . . . she would not even make a substantial effort to come to see me."

According to the Second Circuit:

> "Frank commenced the present action in April 1986 against 'Howard R. Relin, in his official capacity as the Monroe County District Attorney,' naming no other defendants, and not purporting to assert any claims against Relin in his individual capacity" (A 9).

Frank sued pursuant to 42 U.S.C. §1983, invoking the district court's jurisdiction under 28 U.S.C. §1331. Frank filed an amended complaint on April 5, 1991, five years later, asserting claims against Relin in both his official and his individual capacities. Frank has been represented throughout the proceeding by David Rothenberg, Esq.

I. RELIN'S QUALIFIED IMMUNITY DEFENSE SHOULD BE DECIDED ON SUMMARY JUDGMENT USING AN OBJECTIVELY REASONABLE TEST.

Finding no factual dispute about the events which led to Frank's discharge, the district court granted Relin individually summary judgment on the ground of qualified immunity. Contrary to the objectively reasonable test in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), the Second Circuit vacated, concluding: "[T]he issue of Relin's motivation in firing Frank was one that clearly involved disputed questions of fact" (A 28).

The district court analyzed Relin's qualified immunity under the objectively reasonable test, stating:

> "Qualified immunity protects a public official from liability arising from the performance of discretionary functions if that performance does not violate a clearly established statutory or constitutional right of which a reasonable person

> would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether an official is entitled to qualified immunity generally turns on whether it was objectively legally reasonable for the official to believe that he was acting lawfully. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The qualified immunity inquiry is concerned with only the objective legal reasonableness of the defendant's action; *his subjective intent is irrelevant*." [emphasis added] (B 8-9).

Applying this standard in the context of Frank's first amendment claim, Judge Larimer stated:

> "To be accorded First Amendment protection, the employee's speech must involve an issue of public concern, and the interests of the employee, as a citizen, in speaking freely on that issue must outweigh the government's interest, as an employer, in promoting the efficiency of the public services it performs. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *accord Piesco v. City of New York Dep't of Personnel*, 993 F.2d 1149, 1155-56 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 331 (1991). Whether an employee's speech meets these criteria is a question of law. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). However, with a qualified immunity inquiry the issue is not whether an employee's speech is actually entitled to First Amendment protection, but whether a reasonable official would have known that the speech was entitled to such protection." (B 9-10).

Judge Larimer framed the qualified immunity inquiry in this case as whether:

> "[I]n the light of the clearly established law in 1985 and the circumstances that confronted Relin when he fired plaintiff, a reasonable district attorney could have believed that plaintiff's speech did not touch on a matter of public concern, or that under the *Pickering* balancing-of-interests analysis, plaintiff's interests in speaking out, as a citizen, were outweighed by the interests of the District Attorney's Office, as an employer, in promoting the efficiency of its prosecutorial function." (B 11).

Judge Larimer noted it was undisputed that "[Frank's] decision to speak to Pilato, rather than to the ADA she was working with, to her supervisor, or to Relin, adversely affected the working relationships in the District Attorney's Office." He concluded:

> "In light of the concerns that were expressed to him, it was objectively reasonable for Relin to believe that interests of the District Attorney's Office were in jeopardy, and, therefore, that he could lawfully discharge plaintiff under the *Pickering* balancing-of-interests analysis. Even if the staff member's concerns were misguided — or even mistaken — the fact that Relin was confronting a situation in which members of his staff expressed concerns over plaintiff's trustworthiness made his own beliefs regarding the interests of the District Attorney's Office reasonable." (B 14).

The Second Circuit vacated Judge Larimer's decision. Contrary to *Harlow* and *Anderson*, the Second Circuit concluded:

> ". . . the issue of Relin's motivation in firing Frank was one that clearly involved disputed questions of fact. . . . The district court found instead that Relin fired Frank because the ADAs he consulted felt Frank could no longer be trusted and Relin believed her continued presence would therefore be detrimental to the office's interest of 'efficiency', and that such a belief provided him with qualified immunity even if the ADAs' views were 'misguided'. This conclusion would be questionable even were there no issue of fact as to Relin's motivation. . . . In any event, the court's attribution of Frank's firing to a desire to maintain office efficiency constitutes a finding of fact as to Relin's motivation. On a motion for summary judgment, the district court's function is to identify questions of fact, not to decide them. (A 28-29).
>
> . . . .
>
> Finally, the court could not properly uphold Relin's qualified immunity defense as a matter of law on the premise that he was entitled to believe that Frank's First Amendment rights did not outweigh the countervailing interests, for the

> factual question as to Relin's motivation in firing Frank raises a factual question of precisely what interests Relin was weighing against Frank's First Amendment right." (A 30).

Thus the Second Circuit returned to the good faith test for qualified immunity which was abandoned in *Harlow*. Judge Larimer was roundly criticized for following the objectively reasonable test in *Anderson*.

The Second Circuit's failure to follow *Harlow* and *Anderson* is not an aberration in this case. In *Piesco v. City of New York, Dep't of Personnel*, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, ____U.S.____, 112 S.Ct 331 (1991), the district court had granted summary judgment to the City on the ground that Piesco's First Amendment rights did not outweigh the City's interest in efficiently performing government services and to the individual supervisors on the ground of qualified immunity. The Second Circuit held, contrary to the district court:

> "On the peculiar facts of the instant case, we conclude that Dr. Piesco's right to give truthful answers before the Committee takes precedence over the City's interest in efficiently performing government services." *Id.* at 1158.

Thus, in a lengthy opinion, the Second Circuit weighed the competing interests in the *Pickering* balance and found that the balance tipped in favor of Dr. Piesco.

Since the district court in *Piesco* concluded that the *Pickering* balance tipped in favor of the City, it is beyond argument that a reasonable public official could not have predicted the Second Circuit would put its thumb on the other side of the scale. Nevertheless, the Second Circuit denied qualified immunity to the individual supervisors. In so doing the court stated:

> ". . . '[i]n the context of a summary judgment motion, we also must view the record most favorably to [Dr. Piesco], as the party opposing the motion, and 'accept [her] account of

> the reasons for [her] dismissal'. [citation omitted] . . . [F]or the purposes of this appeal, it is assumed that Ortiz and LaPorte retaliated against Dr. Piesco because of her testimony before the Committee." *Id.* at 1160-1161.

Thus for the purposes of qualified immunity, the Second Circuit disposed of the *Pickering* balance altogether, assumed the worst possible subjective motivation, and denied summary judgment. Instead of asking whether a reasonable public official standing in the shoes of Ortiz and LaPorte would have known that discharging Dr. Piesco was illegal, the Second Circuit *assumed* subjective bad faith on the basis of pleadings and denied qualified immunity.

No circuit has stated as decisively as the Second Circuit that a public official who discharges an employee allegedly in violation of the First Amendment is not entitled to qualified immunity so long as his motivation is questioned. Nonetheless, other circuits have followed this approach. In *Roth v. Veterans' Admin. of Government of U.S.*, 856 F.2d 1401, 1408 (9th Cir. 1988), the Ninth Circuit refused to grant qualified immunity to hospital administrators who terminated Roth, stating:

> "Because there are underlying factual issues regarding the extent of office disruption, we hold that the district court properly denied defendants' motion for summary judgment on Roth's first amendment claim." [citation omitted].

Contrary to the Second and Ninth Circuits, the Sixth, Seventh, Eighth and Eleventh circuits have held that the *Pickering* balancing-of-interests in the qualified immunity context is a question of law for the court. *See Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, ____U.S.____, 111 S.Ct. 1681 (1991); *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, ____U.S.____, 112 S.Ct. 1242 (1992); *Bartlett v. Fisher*, 972 F.2d 911 (8th Cir. 1992); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989).

In *Dartland*, *supra*, the county manager fired Dartland for statements made to the newspaper. Reversing and granting summary judgment to the county manager in his individual capacity, the court stated:

> "Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, *the employer is entitled to immunity except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful. This is not such a case.*
>
> . . . .
>
> In an employee discharge case, the event that gives rise to the lawsuit is the firing, not the employer's failure to engage in the mechanics of balancing. Whether the particular employer tried to strike a *Pickering* balance does not determine the outcome of the question of immunity. Failure to apply the *Pickering* balancing test does not subject an official to personal liability if that official's final act toward the employee is objectively reasonable. There is no cause of action against [the county manager] unless the law clearly proscribed the firing of Dartland under these circumstances by any county manager whether the manager tried to strike the *Pickering* balance or not." *Dartland*, 866 F.2d at 1323-1324 [emphasis added].

Thus, contrary to the Second and Ninth Circuits, the Eleventh Circuit does not forbid summary judgment where the official's subjective motivation is at issue. Accord *McDaniel v. Woodard*, 886 F.2d 311 (11th Cir. 1989).

As did the Eleventh Circuit, the Sixth Circuit reversed a denial of qualified immunity, holding:

> "Without concluding where the balance ultimately comes to rest — a decision reserved for the trier of fact — this court must dispose of the motion to dismiss on the basis of qualified immunity pursuant to the dictates of *Harlow*, *Malley*, *Anderson*, *Garvie*, etc., by determining whether Guercio's

> rights under *Pickering*, as opposed to whether the general teachings of *Pickering*, were so clear at the time in question that reasonable minds could not differ on the constitutionality of her discharge. . . . This approach is distinct from that followed by the district court, which mischaracterized the qualified immunity inquiry as one requiring it 'to determine whether the allegations in the Plaintiff's complaint clearly violated established law at the time that the incidents took place.' Similarly reflective of the erroneous approach to the issue was the court's remark that 'the . . . *Pickering* balancing test . . . [was] clearly established law at the time of Ms. Guercio's firing'. As hereinafter discussed, the inquiry as framed by the district court was so abstract that its consideration of the motion to dismiss failed to apply the qualified immunity test to the facts and circumstances of this case. *Guercio*, 911 F.2d at 1184.

Although the Sixth Circuit failed to apply the rule requiring the non-moving party to follow Fed. R. Civ. P. 56(c), *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Second Circuit did not commit this error, and the issue is not raised in this petition. There is no dispute that Frank's discharge came about as the result of her conversations with Pilato. Therefore, the mixed motive analysis established in *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977), is similarly not a part of this petition.

By denying summary judgment when a public official's subjective motivation is in doubt, the Second Circuit has eliminated qualified immunity, at least in First Amendment discharge cases. In contrast, a public official in the Sixth, Seventh, Eighth or Eleventh Circuit is entitled to qualified immunity if the employment decision was objectively reasonable under the *Pickering* balancing test. Certiorari should be granted to examine whether subjective motivation or objective reasonableness should be used to test Relin's qualified immunity.

II. RELIN INDIVIDUALLY IS NOT THE SAME PARTY AS RELIN IN HIS OFFICIAL CAPACITY, AND FRANK'S UNTIMELY AMENDMENT ADDING HIM AS A DEFENDANT DOES NOT RELATE BACK UNDER FED. R. CIV. P. 15(c).

In his decision and order dated September 4, 1991 denying Relin's motion for summary judgment on statute of limitations grounds, Judge Larimer stated:

> "In my view, on the facts of this case the matter should be viewed as the simple addition of a new claim that arose out of the conduct set forth in the original complaint. In that circumstance, the first sentence of Rule 15(c) clearly allows the amendment to relate back to the date of the original pleading. In my view, under these circumstances, since the same person, Howard Relin, is before the court, it would elevate form over substance to consider this amendment as bringing a new 'party' into the lawsuit. . . . The rules for adding a new 'party' are strict and are set out in detail in Rule 15(c) and in the *Schiavone* case. It seems to me, however, that the rationale for the rule as it relates to the addition of new parties simply does not apply when the *same* person is sued but under a different theory or a new claim. That is all that has occurred here." (C 3).

Judge Larimer pointed out in his August 24, 1992 decision, that official capacity suits generally represent only another way of pleading an action against an entity of which the officer is an agent, citing *Kentucky v. Graham*, 473 U.S. 159 (1985). "It is *not* a suit against the official personally, for the real party in interest is the entity." (B 6). The Second Circuit also recognized that the amendment to Frank's complaint constituted the addition of a new party, stating:

> "Frank's belief that an official-capacity suit against an individual is not in effect a suit against the government entity of which he is an official was, of course, a misconception. '[T]he real party in interest in an official-capacity suit is a

> government entity and not the named official. . . .' *Hafer v. Melo*, 112 S.Ct. 358, 361 (1991). Thus, 'an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity'. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)." (A 19).

In his brief to the Second Circuit, Relin urged that the district court's decision granting summary judgment to Relin in his individual capacity be upheld on the alternate ground that Frank's suit against him individually was commenced outside the statute of limitations. In so doing, Relin argued that in *Pauk v. Board of Trustees of City University of N.Y.*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), the Second Circuit upheld that the three-year statute of limitations in New York CPLR §214(2) applied to 42 U.S.C. §1983 suits in New York. Thus Frank's April 5, 1991 amendment to add Relin personally was two years beyond the statute of limitations unless it related back to the date of the filing of the original Complaint under Fed. R. Civ. P. 15(c).

Relin pointed out that Frank *admitted* she deliberately sued him in his official capacity to avoid the defense of qualified immunity. Adding him personally to her suit against Monroe County (her official capacity suit against Relin) was adding a new person who had no knowledge that he would be sued. Relin also argued he had been prejudiced because only Monroe County's attorney participated in discovery.

The Second Circuit noted that Relin moved for summary judgment in his individual capacity on statute of limitations grounds and held:

> "For the above reasons, we conclude that the district court erred in summarily dismissing Frank's claims against Relin in his official capacity and in his individual capacity. We have considered all of Relin's arguments in opposition and have found them to be without merit." (A 31).

Thus, the Second Circuit has affirmed Judge Larimer's Septem-

ber 4, 1991 holding that Relin in his official capacity and in his individual capacity were the same person, although it recognized that Relin individually was a separate party from Relin in his official capacity.

In *Schiavone v. Fortune*, 477 U.S. 21 (1986), this court concluded that Fed. R. Civ. P. 15(c) should be read according to its plain meaning. Thus an amended complaint which adds a party will not relate back to the date of the filing unless the new party "knew or should have known" that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party. Fed. R. Civ. P. 15(c)(3).

The Second Circuit has not found that Frank, but for a mistake concerning the identity of the proper party, would have sued Relin individually in the first instance. Indeed it could not do so in the face of Frank's admission that she deliberately avoided suing Relin individually to avoid a qualified immunity defense. Instead the Second Circuit simply asserts that Relin in his official capacity and Relin in his individual capacity are the same person and thus that there was no change in party.

In *Hill v. Shelander*, 924 F.2d 1370 (7th Cir. 1991), the Seventh Circuit held, as did the Second, that despite this court's holding in *Schiavone v. Fortune*, *supra*, a 42 U.S.C. §1983 defendant need not be sued within the limitation period. In *Hill*, an inmate brought a §1983 action against a prison guard without designating whether he was being sued in his individual or official capacity.

Following expiration of the statute of limitations, the *Hill* complaint was amended to sue the defendant in his individual capacity. Reversing the district court's grant of summary judgment, the Seventh Circuit held that the amendment fell within the ambit of Rule 15(c), concluding:

"[A]mendment with relation back is generally permitted in

> order to correct a misnomer of a defendant where the proper defendant is already before the court and the effect is merely to correct the name under which he is sued. But a new defendant cannot normally be substituted or added by amendment after the statute of limitations has run." *Id.* at 1376 (*quoting Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)).

Dissenting, Judge Coffey concluded:

> "Relation back of the amendment suing Shelander in his individual capacity after the statute of limitations has run cannot be permitted because Hill has failed to establish that his erroneous designation of Shelander's capacity was a 'mistake concerning identity' under any stretch of the imagination, because permitting relation back completely disregards the plain and unambiguous language of Rule 15(c) and because relation back would prejudice Shelander." *Id.* at 1384.

Unlike the Second and Seventh Circuits, the Fourth and Sixth Circuits have concluded that suing the §1983 official capacity defendant is not notice to the individual capacity defendant of a mistake. *See Keller v. Prince George's County*, 923 F.2d 30 (4th Cir. 1991); *Lovelace v. O'Hara*, 985 F.2d 847 (6th Cir. 1993). The facts in *Lovelace v. O'Hara* are strikingly similar to the facts in this case. Lovelace sued: "Officer Lake [sic] O'Hara, deputy sheriff, Pendleton County Sheriff's Department." After the statute of limitations had run, she amended to sue O'Hara individually. Concluding that O'Hara had no reason to believe he would be sued individually until after the statute of limitations had run, and finding merit in O'Hara's arguments of prejudice, the court reversed and remanded for dismissal of the amended complaint.

Contrary to the Second Circuit, Relin in his individual capacity is distinct from Relin in his official capacity. If money damages are awarded against Relin in his official capacity, Monroe County will pay. If they are awarded against Relin in his individual capacity, he will pay, and is entitled to the same notice as any other

defendant so that he can prepare his own defense instead of entrusting it to Monroe County. Certiorari should be granted to determine whether an amendment adding a public official in his individual capacity is an amendment that "changes the party" so that it will not relate back under Fed. R. Civ. P. 15(c)(3) unless there was a mistake concerning the identity of the proper party.

CONCLUSION

Certiorari should be granted to determine whether Relin's qualified immunity should be decided under the objectively reasonable test and whether Frank's untimely amendment adding Relin individually should relate back to the date of the original complaint.

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APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, dated July 28, 1993.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1019, 1344—August Term, 1992

(Argued: May 25, 1993 Decided: July 28, 1993)

Docket Nos. 92-9026, 93-7060

MELINDA C. FRANK,

Plaintiff-Appellant,

—v.—

HOWARD R. RELIN, Individually and in his official capacity as the Monroe County District Attorney,

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge**,
FEINBERG and KEARSE, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Western District of New York, David G. Larimer, *Judge*, dismissing complaint under 42 U.S.C.

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* Judge Newman became Chief Judge on July 1, 1993.

§ 1983 for termination of employment in violation of First Amendment.

Vacated and Remanded.

DAVID ROTHENBERG, Rochester, New York (Geiger & Rothenberg, Rochester, New York, on the brief), *for Appellant.*

WILLIAM G. GANDY, Buffalo, New York (Thomas S. Gill, Lawrence J. Fineberg, Saperston & Day, P.C., Buffalo, New York, on the brief), *for Appellee.*

KEARSE, *Circuit Judge*:

Plaintiff Melinda C. Frank appeals from a final judgment of the United States District Court for the Western District of New York, David G. Larimer, *Judge*, dismissing her complaint seeking damages and other relief pursuant to 42 U.S.C. § 1983 (1988) against defendant Howard R. Relin for termination of her employment in violation of her rights under the First Amendment, and from an order of that court denying her motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b). Ruling that Frank had withdrawn her claim asserted against Relin in his official capacity, the district court dismissed the remainder of her complaint on the ground that Relin had qualified immunity with respect to the claim brought against him in his individual capacity. On appeal, Frank contends chiefly that the court erred (1) in ruling that she

had withdrawn her claim against Relin in his official capacity, (2) in dismissing her complaint to the extent that it requested equitable relief, and (3) in granting summary judgment on Relin's defense of qualified immunity. For the reasons below, we agree, and we vacate and remand for further proceedings.

I. BACKGROUND

From December 1981 until November 15, 1985, Frank was employed in the Office of the District Attorney ("DA") for Monroe County, New York (the "County"), as a "victim-witness coordinator." During the relevant period, Relin was the district attorney. His staff included a "First" assistant district attorney ("ADA"), whom we refer to as "A" and who was next in command after Relin; and Special ADA Louis P. Pilato, who ranked as a "Third" ADA and was in charge of the office's investigative unit. Pilato, who had served in the DA's office for some 11 years, was responsible for supervising several bureaus and 20-30 people who staffed those bureaus; he had no supervisory responsibility for the victim-witness bureau. Frank's direct supervisor was the office administrator, ADA George Sofia. Affidavits and testimony received in the district court, construed in the light most favorable to Frank, reveal the following events preceding Relin's termination of Frank's employment.

A. *Frank's Responsibilities and Her Concerns*

As victim-witness coordinator, Frank was a liaison between the DA's office and the victims of and witnesses to crimes. Her responsibilities included locating and contacting victims and witnesses, counseling them, participating in their interviews, and generally shepherding them

through the trial process. Until the events in question, Frank by all accounts performed her job well. She consistently received "exceptional" ratings in annual reviews and was described as a "very hard working and dedicated" employee.

If, in the course of a conversation, a witness mentioned something to Frank that was not known to the ADA assigned to the case, Frank was to relay that information to the ADA. In early 1985, Frank was assisting one Sam Tibone, a victim and witness in a criminal case being handled by an ADA to whom we refer as "B". A police officer stopped Frank in the hallway outside the district attorney's office and asked her why she was with Tibone. When Frank explained that Tibone was the victim in a case, the officer advised her to tell ADA "B" immediately that Tibone " 'has a criminal record as long as your arm.' " (Hearing Transcript dated August 11, 1988 ("Aug. 11 Tr."), at 10 (testimony of Frank).) Frank promptly attempted to relay the information to "B". "B", however, stated that he did not want to hear about Tibone's criminal record until " 'after the trial is over.' " (*Id.* at 11.) Frank did not tell anyone about "B" 's reaction at that time.

In the summer of 1985, Frank was working on the prosecution of one David Larson, who was accused of murdering a fourteen-year old girl while she was babysitting. Apparently the police had found Larson's fingerprint at the crime scene, and "A", who was assigned to the case, viewed the fingerprint as a particularly strong piece of evidence. However, when, as requested by "A", Frank contacted two witnesses to determine whether they were still available for trial, the witnesses told Frank they had seen Larson at the crime scene prior to the date of the murder. The witnesses were willing to come to the DA's

office to be interviewed; but according to Frank, "A" told her

> not to bother bringing them in for an interview, that he felt this would be very harmful to our case, that if we proved the defendant had been in the house prior to the night of the homicide, that this fingerprint would be thrown out.

(*Id.* at 15-16.)

The next morning, Frank approached Pilato and told him she was concerned about some information she had about a criminal case and was wondering what information the ADAs wanted withheld before trial. Pilato asked Frank what she meant, and she told him about her conversations with "B" concerning the Tibone matter and with "A" concerning the Larson matter. Pilato told Frank: " 'I think that's Brady [*Brady v. Maryland*, 373 U.S. 83 (1963)] material.' " (Aug. 11 Tr. at 19 (testimony of Frank).) He explained to Frank, who did not know what *Brady* material was, that that meant the information should be turned over to the defense. Pilato was clearly concerned, saying,

> I'm going to have to do something about this. I don't know what it's going to be, but . . . if this should ever come out, . . . I could be disbarred.

(*Id.* at 20.) Frank asked Pilato to let her know what he intended to do before he took any action.

Some time later, "A" asked Frank to contact another potential witness in the Larson case. Frank spoke to the witness by telephone and learned that the witness knew Larson and had seen him at about 9:30 on the night of the murder. According to Frank, the witness

> said—her conversation with Larson was, "David, what are you on?" And his response to her was, "I'm on Black Velvet and acid."

(*Id.* at 22.)

Frank told "A" about her telephone conversation with this witness and asked him if he wanted her to bring the witness in for an interview. "A" told Frank, " 'No, don't bring her in. That will only help the defendant's case.' " (*Id.* at 23.) Frank was concerned by this because normally "A" "followed up on every bit of information in order to avoid any surprises in the courtroom." (*Id.*) She therefore wanted to discuss the matter with someone. However, "A" had rushed off to attend to other matters; Relin was out of the office, as was the ADA who ranked just behind "A"; and Sofia, Frank's supervisor, had an office full of people. Frank therefore turned again to Pilato.

Frank told Pilato that "A" had told her not to bring in a potential witness who had indicated a defendant had been drinking and was on drugs. Frank asked whether Pilato would normally interview such a witness in his own cases; he stated he would and that he was " 'going to have to do something about this.' " (*Id.* at 25.) Frank asked he what he intended to do, to which he responded he did not know. Frank again asked Pilato to let her know what he intended to do before he did anything.

Immediately after that conversation, Pilato spoke to Justice Robert Kennedy, the supervisory judge of the Monroe County criminal courts, and reported on Frank's statements about "A" 's handling of the Larson case. Later that day, Pilato told Frank he had discussed the matter with Justice Kennedy, and Frank became upset because Pilato had acted without first telling her. That evening, Frank called "A" and told him what Pilato had done.

B. *The Termination of Frank's Employment*

On September 13, 1985, Justice Kennedy summoned Relin and informed him that "A" might be mishandling potentially exculpatory material in the Larson case. Relin, apparently surprised by what he heard, returned to his office to investigate the matter. He learned that it was Pilato who had informed Justice Kennedy about the Larson matter and that Pilato's impetus had been a conversation with Frank. Relin stated that he had confronted Frank and inquired why she had not followed proper office procedure (described by Relin at the hearing as an unwritten procedure) and expressed her concerns to her immediate supervisor or Relin, rather than discussing "A" 's case with Pilato. He told Frank "she had made the most serious type of error in judgment" and that he planned to discuss her performance with the members of his senior staff. (Hearing Transcript dated February 13, 1989 ("Feb. 13 Tr."), at 30 (testimony of Relin).)

Relin thereafter convened a meeting attended by, *inter alios*, Relin, Sofia, "A", and "B" (Pilato apparently had been fired immediately) to discuss the matter, and their principal focus appears to have been whether or not Frank should be fired. According to the testimony of Sofia, "[i]t was arrived at through a consensus meeting of the administrative division heads of the District Attorney's Office and the District Attorney" (*id.* at 15) "that Mrs. Frank could no longer be trusted; that her position was a key one, and she would be working with trial attorneys, and it was determined that she couldn't—her position was too important, and she could no longer be trusted" (*id.* at 14).

On September 20, 1985, Relin relieved Frank of her duties and asked her to resign. Three days later, Frank was given letters of recommendation by "A", Sofia, and

Relin. "A" stated that the victim-witness program as initiated and expanded by Melinda ("Lynn") Frank "now serves as a model for other district attorneys offices throughout the State. In this regard, Lynn's dedication to this office, her work, and her attitude have, in my opinion, been excellent." ("To Whom It May Concern" Letter from "A" dated September 23, 1985.) After stating that Frank had assisted him personally in numerous cases, including some 15 homicide trials, "A" concluded:

> I have every confidence in Lynn Frank's abilities, and feel that her skills would translate well into any area of endeavor. I would certainly recommend Lynn most highly in whatever field she chooses.

(*Id.*) Sofia's letter was similar:

> As her supervisor, I can say that her dedication and devotion to her duties, as well as to this office, remained at the highest levels. Her insights into various aspects of the job were astute and timely.
>
> Lynn will be missed here, but, I am sure wherever she goes, she will be a valued asset. I recommend her for employment without reservation.

("To Whom It May Concern" Letter from Sofia dated September 23, 1985.) Relin wrote that in her four years' work with the DA's office, Frank had "demonstrated outstanding skills in dealing with people" and had "made trying felony cases a pleasure for many of the attorneys within the Monroe County District Attorney's Office." ("To Whom It May Concern" Letter from Relin dated February [*sic*] 23, 1985.) Relin continued:

> On a personal level, I have found Ms. Frank to be a person who seeks out assistance and advice and a person who has an overriding concern for her

> office, and for the reputation of that office. Ms. Frank has been a real asset to the Monroe County District Attorney's Office, and we will miss her very much. She would be an extremely valuable employee for any occupation that I can think of that deals with people, and I would give her the highest recommendation for future employment.

(*Id.*)

C. *The Present Lawsuit*

Frank commenced the present action in April 1986 against "Howard R. Relin, in his official capacity as the Monroe County District Attorney," naming no other defendants, and not purporting to assert any claims against Relin in his individual capacity. The complaint alleged principally that Relin (1) had violated Frank's right to due process by depriving her of a property interest created by a state grant to the victim-witness program, and (2) had violated her First Amendment right to speak on matters of public concern; and it sought compensatory and punitive damages and attorney's fees. A jury trial was demanded. Relin's answer generally denied the allegations of the complaint, challenged the court's subject matter jurisdiction, and asserted that Frank's resignation had been the result of her own culpable conduct and had been voluntary.

Following some two years of discovery, Relin moved for summary judgment principally on the grounds (1) that Frank had no property interest in her position, and (2) that her speech was not protected by the First Amendment. As to the latter ground, Relin contended chiefly that Frank had been concerned not with a matter of public importance but with her own performance in the DA's office,

and that she had complained to Pilato because she was disappointed that the ADAs with whom she worked did not embrace her suggested strategies for case management. He also contended that he had discharged Frank not because of the content of her statements to Pilato but because of her poor judgment in consulting with Pilato rather than her immediate supervisor or Relin.

The district court granted the motion to dismiss the due process claim on the ground that Frank lacked a property interest in her job, and it ordered an evidentiary hearing designed to permit it to decide the issues of law relating to the First Amendment claim. Following that hearing, at which Frank, Relin, Sofia, and Pilato testified as to the events preceding Frank's termination, the court, in a decision and order dated August 1, 1989 ("1989 Decision"), reported at 719 F. Supp. 138, denied Relin's motion for summary judgment on the First Amendment claim. Without deciding whether or not ADAs "A" and "B" had made the statements Frank attributed to them, *id.* at 143 n.2, the court found that "[t]his was not just a personal employment dispute," *id.* at 142, and that Frank "was primarily concerned about what she perceived to be prosecutors' seeming indifference to evidence which may have been favorable to the defense," *id.* at 143. It concluded that

> Frank's statements to Pilato, a senior, experienced assistant DA who served in a supervisory capacity, related to the efficient and effective functioning of the office and to assuring that relevant, material evidence is fully developed and made available to the prosecution and the defense to guarantee that defendants obtain a fair trial. Clearly, these issues are matters of legitimate public concern.

Id. at 142.

Stating that Relin had not cited any concern that Frank's conduct would hinder the efficient operation of the DA's office but instead "testified that the *only* reason for Frank's discharge was that she spoke to Pilato rather than her immediate supervisor or someone else in the chain of command," *id.* at 144 (emphasis in original), and that there was "no evidence that Frank violated an established office policy or procedure in consulting with Pilato," *id.*, the court concluded that there remained questions of fact as to whether Frank had been fired because of the content of her speech:

> [T]here may be questions of fact concerning whether the nature or content of Frank's speech was a substantial or motivating factor in her discharge and, ultimately, whether she was discharged in retaliation for exercise of her constitutionally protected right of freedom of expression.

Id. at 145.

In November 1990, more than a year later, Relin sought to amend his answer in order to raise an affirmative defense of qualified immunity. Frank responded that if Relin were to amend his answer, Frank would wish to amend her complaint to add a claim against Relin in his individual capacity. The district court decided to allow Frank first to amend her complaint, following which Relin could file a new answer.

Frank filed her amended complaint in April 1991, asserting claims against Relin in both his official and his individual capacities. In addition to seeking the monetary relief requested in the original complaint, the amended complaint also requested equitable relief in the form of reinstatement, with backpay and full seniority rights. After moving unsuccessfully to dismiss the amended com-

plaint's individual-capacity claim on statute-of-limitations grounds, on the theory that that claim did not relate back to the date of the initial complaint, Relin filed his amended answer, again generally denying the allegations of the complaint, and asserting, in addition to his original defenses, the defense of qualified immunity.

In April 1992, Relin moved for summary judgment (1) dismissing the claim asserted against him in his individual capacity on the ground of qualified immunity, and (2) dismissing the claim for monetary damages asserted against him in his official capacity, on the ground that there was no basis for imposition of municipal liability. In connection with the former, Relin submitted an affidavit stating that

> Frank had a duty to inform me or her supervisor of her concerns about how prosecutions were being handled.
>
> 14. It was Frank's *failure to tell me or her supervisor of her concerns*, and not her conversations with Pilato, which resulted in her discharge.

(Affidavit of Howard R. Relin dated April 7, 1992, ¶¶ 13, 14 (emphasis in original).)

In connection with the motion to dismiss the official-capacity claim, Relin asserted (a) that though he "ha[d] discretion to hire and fire his employees" (Memorandum of Law in Support of Defendant's Motion for Summary Judgment filed May 1, 1992, at 2), he was not a policymaker because Frank's job was a civil service position and the final policymakers were the County Civil Service Commission or Director of Personnel Services, and (b) that Frank had not established, as required by *Monell v. Department of Social Services*, 436 U.S. 658 (1978)

("*Monell*"), that she had been fired pursuant to a municipal policy or custom. As discussed in greater detail in Part II.A. below, Frank responded that *Monell* was not relevant because she was not seeking monetary relief against the County but only against "Relin, in his individual and official capacities." (Plaintiff's Memorandum of Law in Opposition to Defendant's Final Motion for Summary Judgment dated May 7, 1992 ("Frank Summary Judgment Memorandum"), at 2.)

In an unreported Decision and Order dated August 24, 1992 ("1992 Decision"), the district court granted Relin's motions for summary judgment and dismissed the complaint in its entirety. The court dismissed Frank's official-capacity claim chiefly on the ground that, in responding to Relin's summary judgment motion, Frank had withdrawn that claim. The court also stated that if Frank had not withdrawn the claim, it would have been dismissed on the ground that she "ha[d] offered no evidence to support a claim that the alleged constitutional violation was a result of municipal policy or that defendant is a policy-making official." 1992 Decision at 9 n.4.

As to the individual-capacity claim, the court ruled that Relin was entitled to qualified immunity. It stated that

> the qualified immunity inquiry in this case is whether, in light of the clearly established law in 1985 and the circumstances that confronted Relin when he fired plaintiff, a reasonable district attorney could have believed that plaintiff's speech did not touch on a matter of public concern, or that under the *Pickering* [*v. Board of Education*, 391 U.S. 563, 568 (1968)] balancing-of-interests analysis, plaintiff's interests in speaking out, as a citizen, were outweighed by the interests of the District Attorney's

Office, as an employer, in promoting the efficiency of its prosecutorial function.

When he fired her, Relin knew that plaintiff's speech involved allegations that touched on issues relating to possible *Brady* material.

1992 Decision at 13. But the court found it

significant that plaintiff's speech raised, at most, only the specter of a possible *Brady* violation. Plaintiff made no allegations then, or now, to suggest that she believed that certain ADAs in the District Attorney's Office were involved in an attempt to deprive criminal defendants of access to *Brady* material or an attempted cover-up of past wrong-doings. Thus, at most, plaintiff's speech concerned a dispute over the proper interpretation of the *Brady* doctrine, a legal issue over which reasonable minds could differ. As such Relin was reasonable in believing that the speech was not entitled to much weight in the *Pickering* balancing-of-interests analysis. *See Giacalone* [*v. Abrams*, 850 F.2d 79, 86 (2d Cir. 1988)] (speech which expressed differences of opinion on legal strategy was not entitled to much weight). It is also significant that plaintiff was not a lawyer, because even if I assume that plaintiff intended to allege that ADAs were failing to disclose *Brady* material, plaintiff's status as a nonlawyer made it reasonable for Relin to give plaintiff's opinion on a legal matter, and her First Amendment interests in expressing that opinion, little weight under the *Pickering* analysis.

In contrast, it was objectively reasonable for Relin to believe that the interests of the District Attorney's Office in promoting the efficiency of its prosecutorial services were high, and that plaintiff's speech and

> conduct had an adverse impact on these interests. . . .
>
> The need for confidentiality and personal loyalty, as a foundation for establishing good working relationships, is especially critical to the proper functioning of a district attorney's office. The nature of the work done in a prosecutor's office is such that prosecutors must be able to trust each other and their staff in order to operate effectively. Breaches of confidentiality, loyalty, or trust, whether real or imagined, pose a serious threat to the efficient operation of a district attorney's office, and can undermine the effectiveness of the prosecutorial services it provides.

1992 Decision at 15-17 (footnote omitted). The court found that Relin's staff members felt that Frank could no longer be trusted, and it concluded that

> [i]n light of the concerns that were expressed to him, it was objectively reasonable for Relin to believe that interests of the District Attorney's Office were in jeopardy, and, therefore, that he could lawfully discharge plaintiff under the *Pickering* balancing-of-interests analysis. Even if the staff member's [*sic*] concerns were misguided—or even mistaken—the fact that Relin was confronting a situation in which members of his staff expressed concerns over plaintiff's trustworthiness made his own beliefs regarding the interests of the District Attorney's Office reasonable.

1992 Decision at 17.

Judgment was entered dismissing the complaint, and Frank promptly appealed. Thereafter, she moved in the district court pursuant to Fed. R. Civ. P. 60(b) to set aside

the judgment on the ground that her amended complaint sought two forms of equitable relief and that qualified immunity was not a defense to a claim for such relief. The district court denied the motion, and Frank has appealed that decision as well.

II. DISCUSSION

On appeal, Frank contends principally (1) that she did not withdraw her official-capacity claim against Relin, (2) that the district court could not properly dismiss her claim for reinstatement and backpay because that was an equitable claim to which qualified immunity is not a defense, and (3) that Relin was not entitled to summary judgment on his qualified-immunity defense even against her claim for damages. Though some of Frank's arguments confuse the principles and immunity defenses applicable to § 1983 actions, *see generally Gan v. City of New York*, Nos. 92-7971, -7993, slip op. 3553, 3565-67 (2d Cir. June 1, 1993), we conclude for several reasons that the district court erred in dismissing her official-capacity claim, and we conclude that the existence of fact issues made summary judgment inappropriate with respect to Relin's qualified-immunity defense against the individual-capacity claim.

A. *The Official-Capacity Claim*

The district court ruled that Frank had withdrawn her claim against Relin in his official capacity, and it dismissed that claim chiefly on that basis, noting its view also that Frank had presented no evidence of a municipal policy leading to her firing. We conclude that the court should not have dismissed the official-capacity claim for three reasons: (1) the memorandum on which the court

relied for its conclusion that Frank had withdrawn this claim displayed a doctrinal confusion that should not have been automatically equated with a withdrawal of the claim; (2) the court did not explore the role of a district attorney as policymaker in the administration of his office; and (3) the court summarily dismissed Frank's official-capacity claim in its entirety, notwithstanding the fact that Relin had sought summary dismissal of that claim only to the extent that it requested money damages.

1. *Frank's Confusion*

The Frank memorandum on which the district court relied in concluding that she had withdrawn her official-capacity claim was submitted in response to Relin's motion to dismiss her monetary claims. Relin's motion contended—correctly, as we discuss below—that a suit against him for monetary relief in his official capacity constituted, in effect, a suit against the County and that the principles governing municipal liability applied. Frank's response to this argument was, in pertinent part, as follows:

> Defendant's motion for summary judgment must be denied because the motion misconstrues applicable law regarding the impact of defendant's decision-making authority. Defendant's motion relies on Supreme Court cases that limit a ***municipality's*** [emphasis in original] liability for the actions of a municipal official. In the instant case, however, ***plaintiff has not sued any municipality, but has only sued the defendant Relin, in his individual and official capacities.*** . . .
>
> . . . .

[*Monell* and its progeny] would raise difficult issues in the context of the present case, had plaintiff elected to sue the County of Monroe. In that instance, the court would have been called upon to determine whether District Attorney Relin was a municipal policy maker, and whether the particular decision made by Relin with respect to terminating plaintiff's employment represented official County policy. But it is unnecessary to decide these difficult issues in the instant case because of this simple fact: ***Plaintiff has not sued the municipality. She has not named the County of Monroe as a party defendant. Instead, plaintiff has sued only defendant Howard R. Relin, who is now named in his individual and official capacities.*** Accordingly, the issues raised by *Monell* . . . are simply inapposite to the instant case.

Defendant's own argument in support of the instant motion for summary judgment seems to acknowledge the flaw in his reasoning. Defendant argues that he is required to comply with New York Civil Service Law and the rules and policies of the Monroe County Civil Service Commission. This contention is beside the point, because plaintiff's employment was not governed by New York Civil Service Law; at no time was her position a civil service position. . . . Furthermore, after making this argument, defendant states that "Monroe County cannot be held liable for Relin's actions in matters of employment and personnel administration including his decision to [terminate plaintiff]." . . . Without conceding the validity of this argument, ***plaintiff simply notes that she is not seeking to hold the County of Monroe liable for Relin's actions; rather, she is simply seeking to hold***

> *the defendant liable, in his official and individual capacities.*

(Frank Summary Judgment Memorandum at 2-4 (emphasis added, except where indicated).) The district court construed these statements as an "admission that she does not wish to sue Monroe County" and as a "withdrawal of her claim against defendant in his official capacity." 1992 Decision at 9.

Frank's belief that an official-capacity suit against an individual is not in effect a suit against the governmental entity of which he is an official was, of course, a misconception. "[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official . . . ." *Hafer v. Melo*, 112 S. Ct. 358, 361 (1991). Thus, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Consequently, Frank's repeated statements that she was not suing the County and was not seeking to hold it liable for Relin's actions were fallacious in light of her repeated statements that she sought to recover from Relin in his official capacity.

Such confusion is not uncommon, however, *see, e.g.*, *Gan v. City of New York*, Nos. 92-7971, -7993, slip op. at 3566-67, and in order to avoid disadvantaging a party with a potentially viable claim solely on account of counsel's misconceptions, courts afford plaintiffs more leeway than usual with respect to the characterizations of their § 1983 claims against government officials. For example, when the face of a complaint fails to state clearly whether a government official is being sued in his official capacity, or his individual capacity, or both, courts look to " '[t]he course of proceedings' " to determine "the nature

of the liability to be imposed." *Kentucky v. Graham*, 473 U.S. at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)). Thus, a plaintiff who has not clearly identified in her complaint the capacity in which the defendant is sued should not have the complaint automatically construed as focusing on one capacity to the exclusion of the other. By the same token, a party who is unclear in argument as to the capacity in which the defendant can be pursued should not lightly be deemed to have withdrawn a claim that was expressly stated. When the party's defense of her stated claim bespeaks a doctrinal confusion, the court should not presume that there has been abandonment but should instead give her the opportunity either to abandon the claim or to pursue it with a corrected understanding as to what proof will be required to establish it.

In the present case, notwithstanding the doctrinal confusion displayed by Frank's memorandum, one fact stands out clearly: Frank, who had expressly asserted a claim against Relin in his official capacity, had no thought whatever that she was abandoning her claim against Relin in that capacity. While no doubt a party could, in defending against a motion for summary judgment, concede that a claim lacked merit, Frank's memorandum made no such concession. And whether Frank would actually have chosen to abandon her official-capacity claim if she had understood that the principles governing suits against a municipality were applicable to her official-capacity claim, *see Hafer v. Melo*, 112 S. Ct. at 361-62 ("Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" must have played a part in the violation of federal law.' "); *see generally Gan v. City of New York*, Nos. 92-7971, -7993, slip op. at 3565-66, is not answered in this record.

On remand, Frank should be given the opportunity to elect whether to pursue the official-capacity claim.

2. *District Attorney as Municipal Policymaker*

Nor do we agree with the district court's alternative view that Frank's official-capacity claim was dismissable because she had "offered no evidence to support a claim that the alleged constitutional violation was a result of municipal policy or that defendant is a policy-making official." 1992 Decision at 9 n.4. The district court's conclusion that there was no indication that Relin was a policymaking official within the meaning of *Monell* is, at best, premature. We have noted that generally, "[w]here a district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker." *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1387 (1993); *see also Gan v. City of New York*, Nos. 92-7971, -7993, slip op. at 3582 (same).

Construed in her favor, the record indicates that Frank was hired by Relin's predecessor and was reappointed by Relin upon his election to district attorney. She was asked to resign by Relin after he had discussed the matter with "the top administrative personnel in the district attorney's office" (Feb. 13 Tr. at 5 (testimony of Sofia)). Plainly Relin undertook his actions as manager of the Monroe County District Attorney's Office.

Though Relin contended that he was not a policymaker because Frank's position was controlled by civil service laws and that his discretion to hire and fire was subject to review and regulation by the County Civil Service Commission, Frank denied that her position had ever been covered by civil service, and the district court declined to

decide this issue. Nor has that issue, undeveloped below, been fully briefed on this appeal. We would note, however, that there is a good deal of tension between Relin's contention that Frank's position was governed by civil service and the proposition that he was permitted to fire her in the interest of improving office "efficiency" or morale.

In any event, the matter of whether Relin had final policymaking authority is a question of state law and is an issue to be decided by the court. *See, e.g., Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). If Relin was not the final decisionmaker, of course, the decisionmaker cannot be held liable for Relin's actions on a theory of *respondeat superior*, though it can be held liable if it approved of or acquiesced in his actions. *See generally id.* at 736-38.

3. *The Equitable Claim*

Finally, we note that Relin's motion for summary judgment with respect to the official capacity claim sought dismissal only "with respect to Plaintiff's request for monetary damages." (Motion for Summary Judgment dated April 30, 1992, at 1.) In her amended complaint, Frank requested not only monetary relief but also reinstatement, relief that was equitable. Relin made no effort to present grounds to support summary dismissal of Frank's claim to the extent that it sought reinstatement. The court apparently viewed the reinstatement claim, *sua sponte*, as one to which Relin's defense of qualified immunity was applicable. However, such equitable relief could be obtained against Relin only in his official, not his individual, capacity; and a defense of qualified immunity may properly be raised only with respect to claims asserted against a defendant in his individual capacity.

Qualified immunity is not a defense to a claim against a municipal official in his official capacity. *See Hafer v. Melo*, 112 S. Ct. at 361-62; *Kentucky v. Graham*, 473 U.S. at 167; *Gan v. City of New York*, Nos. 92-7971, -7993, slip op. at 3566.

Accordingly, the court's summary dismissal of the official-capacity claim to the extent that it sought equitable relief was error.

B. *Qualified Immunity and the Individual-Capacity Claim*

In a § 1983 action, qualified immunity shields a defendant official sued in his individual capacity "from liability for civil damages insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), or, even where the rights were clearly established, if it was objectively reasonable for the official to believe that his acts did not violate those rights, *see Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987). In order to determine whether a particular right was clearly established at the time a defendant acted, a court should consider:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1565 (1992); *see also Benitez v. Wolff*, 985 F.2d 662, 666 (2d Cir. 1993). Such immunity does not

attach where the "contours of the right" were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. at 640; *see, e.g., Piesco v. City of New York*, 933 F.2d 1149, 1160 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *Vasbinder v. Ambach*, 926 F.2d 1333, 1341 (2d Cir. 1991).

Absent extraordinary circumstances, if the law was clearly established, the defendant official is not entitled to summary judgment on his immunity defense "since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. at 819. Nonetheless, even where the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 345-46 (1986); *Robison v. Via*, 821 F.2d at 921. In such a case, the defense will turn on the particular facts, and summary judgment will be appropriate only if the defendant "adduce[s] sufficient facts [such] that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant[ ]" to believe that he was acting in a fashion that did not clearly violate an established federally protected right. *Halperin v. Kissinger*, 807 F.2d 180, 189 (D.C. Cir. 1986) (Scalia, J., sitting by designation); *Robison v. Via*, 821 F.2d at 921.

1. *The Clearly Established First Amendment Principles*

With respect to the claim asserted by Frank, it was established prior to 1985 that government employees had a right under the First Amendment, though not an unlimited right, to speak on matters of public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Where a government employer discharges an employee on account of the employee's speech, the determination of whether the public employer has properly discharged the employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

To make out a prima facie case on such a claim, the employee must establish first that her speech can be " 'fairly characterized as constituting speech on a matter of public concern,' " *id.* (quoting *Connick v. Myers*, 461 U.S. at 146), and second "that that speech was at least a 'substantial' or 'motivating' factor in the discharge," *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2d Cir. 1993) (quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)). The first element is a question of law, the second a question of fact.

If the plaintiff establishes both elements, the employer may nonetheless escape liability in either of two ways. It may prevail if it can show that it would have made the same decision in the absence of the protected conduct, *see Mt. Healthy City School District Board of Education v.*

Doyle, 429 U.S. at 286, or if it can show that the employee's conduct interfered with its "effective and efficient fulfillment of its responsibilities to the public," *Connick v. Myers*, 461 U.S. at 150. With respect to the latter defense, "the [government]'s burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id.*

2. *The Record in the Present Case*

The record in the present case did not permit summary judgment in favor of Relin on his qualified immunity defense for two reasons. First, Frank's speech plainly centered on a matter of societal importance, *i.e.*, "assuring that relevant, material evidence [wa]s fully developed and made available to the prosecution and the defense to guarantee that defendants obtain[ed] a fair trial," 1989 Decision, 719 F. Supp. at 142. Second, there are questions of fact as to the reasons Relin fired Frank, and those questions affect both the merits and the qualified immunity defense.

As to the nature of Frank's speech, we reject the district court's 1992 view that that speech did not concern possible wrongdoing in the DA's office but "at most, . . . concerned a dispute over the proper interpretation of the *Brady* doctrine, a legal issue over which reasonable minds could differ," and that Relin could reasonably have believed that this was merely an "opinion on a legal matter" that was entitled to little weight in the *Pickering* balancing-of-interests analysis. 1992 Decision at 15-16. In reaching this conclusion, the district court likened Frank's concerns to those of the attorney-plaintiff in *Giacalone v. Abrams*, 850 F.2d 79, 87-88 (2d Cir. 1988). The two cases are not parallel.

In *Giacalone*, the plaintiff disagreed with his superiors as to the proper interpretation of certain provisions of the federal tax laws and hence as to the appropriate steps to be taken with respect to certain administrative matters. Giacalone sought to make his own views known to members of the public and to belabor them within the office. Prior to being fired, he made no accusations as to any serious matters of potential impropriety.

In the present case, there is no indication in the record that Frank, a nonlawyer, sought to contest the meaning of *Brady*. Indeed, when she first questioned Pilato as to what information the ADAs wanted or did not want to receive, Frank did not even know what the *Brady* doctrine was. She merely understood (1) that she had certain information that had logical relevance (an understanding not dependent on legal training); (2) that both "A" and "B" told her they did not want the information prior to trial; and (3) that "A" told her he did not want it because it would be helpful to the defendant. But whether or not Frank was aware of *Brady*, she, unlike the plaintiff in *Giacalone*, was plainly raising questions of serious public concern. *See, e.g., Connick v. Myers*, 461 U.S. at 148 (question of "actual or potential wrongdoing . . . on the part of" the district attorney's staff is a matter of serious public concern); *see also Dobosz v. Walsh*, 892 F.2d 1135, 1141-42 (2d Cir. 1989) (same re police officer's cooperation with Federal Bureau of Investigation ("FBI") and testimony against fellow officer as to possible planting of gun on person shot by latter officer); *Vasbinder v. Ambach*, 926 F.2d at 1341 (same re plaintiff's report to FBI of his suspicions of overbilling in federally funded program overseen by his agency); *Rookard v. Health & Hospitals Corp.*, 710 F.2d 41, 46-47 (2d Cir. 1983) (same re government employee's private report of allegations of

corrupt and wasteful practices outside chain of command to agency's inspector general). In sum, as a matter of law, the district court erred in characterizing Frank's conversations with Pilato as touching only insignificantly on a matter of public concern.

Nor could Relin reasonably have viewed Frank's statements as not touching on a matter of public concern. Even if Relin were, on his own, inclined to view the matter as not significant, as the district court did in its 1992 Decision, the very fact that a New York Supreme Court Justice summoned him to chambers to broach the matter would have made it clear to any objectively reasonable official that the substance of Frank's statements was a matter of serious public concern and hence could not be weighed lightly in the *Pickering* balancing-of-interests analysis.

Further, the issue of Relin's motivation in firing Frank was one that clearly involved disputed questions of fact. The record would permit a rational factfinder to infer that Frank was fired because of the content of her speech, *i.e.*, because she disclosed actual or potential wrongdoing by "A" and "B". The district court found instead that Relin fired Frank because the ADAs he consulted felt Frank could no longer be trusted and Relin believed her continued presence would therefore be detrimental to the office's interest of "efficiency," and that such a belief provided him with qualified immunity even if the ADAs' views were "misguided." This conclusion would be questionable even were there no issue of fact as to Relin's motivation. Prosecutorial "efficiency" cannot outweigh the right of an employee to raise with a supervising attorney the question of nondisclosure of *Brady* material, especially when the main champions of that countervailing "efficiency" are those implicated in the suggestion of *Brady* derelictions. If the reason for the ADAs' desire to

be rid of Frank were a lack of trust in her ability or willingness to remain silent about *Brady* violations, office efficiency or morale grounded on such considerations could not outweigh Frank's speech, and a competent public official could not reasonably believe that it would.

In any event, the court's attribution of Frank's firing to a desire to maintain office efficiency constitutes a finding of fact as to Relin's motivation. On a motion for summary judgment, the district court's function is to identify questions of fact, not to decide them. Nor may the court make credibility assessments; those assessments are to be made by the finder of fact. As the district court seemed to recognize in its 1989 Decision, the question of Relin's motivation could not be decided as a matter of law. Indeed, we note that Relin's positions in this litigation have presented something of a moving target. His initial answer to the complaint took the position that Frank had not been fired but had resigned voluntarily. At the February 13, 1989 hearing, he suggested that Frank had been fired because her conversations with Pilato had impaired "the workings of the office and the functionings of the office." (Feb. 13 Tr. at 56.) In a 1992 affidavit, he stated that he had fired Frank because she had not brought her *Brady* concerns to him or Sofia, and not because she had spoken to Pilato. And one of Relin's 1992 memoranda in support of summary judgment went so far as to intimate that Frank had been fired because, by asking Pilato not to take any action with respect to the actions of "A" and "B" without first informing her, she had in fact sought to *conceal* the *Brady* derelictions. An assessment of the credibility of Relin's denial that he fired Frank because of the content of her disclosures to Pilato may well be affected by the variety of positions he has taken.

Relin's contention that Frank's conduct had impaired office relationships was supported by Sofia's testimony that the top ADAs felt Frank could not be trusted. That testimony itself, however, assuming it were credited in the face of the glowing posttermination letters of recommendation written for Frank by Sofia, Relin, and "A", raises questions as to the focus of the mistrust. A rational factfinder could conclude that a mistrust based on Frank's action in taking her *Brady* concerns to "a senior, experienced assistant DA who served in a supervisory capacity," 1989 Decision, 719 F. Supp. at 142, was no more than an antipathy for the content of Frank's statements, *i.e.*, that the ADAs felt that they could not trust Frank not to disclose *Brady* violations. And the credibility of Relin's suggestion that he fired Frank solely because she did not come to him with her *Brady* concerns, in order to permit Relin to investigate them, is suspect in light of the fact that his administrative response was to consult, as to whether Frank should be fired, with the very ADAs who may have been committing the *Brady* infractions.

Finally, the court could not properly uphold Relin's qualified immunity defense as a matter of law on the premise that he was entitled to believe that Frank's First Amendment rights did not outweigh the countervailing interests, for the factual question as to Relin's motivation in firing Frank raises a factual question of precisely what interests Relin was weighing against Frank's First Amendment right. If Relin fired Frank because she "blew the whistle" on *Brady* violations, that consideration could not outweigh her First Amendment right to speak up about those violations, no matter how piercing the whistle to the ears of the ADAs.

CONCLUSION

For the above reasons, we conclude that the district court erred in summarily dismissing Frank's claims against Relin in his official capacity and in his individual capacity. We have considered all of Relin's arguments in opposition and have found them to be without merit. The judgment and Rule 60(b) order of the district court are vacated, and the matter is remanded for further proceedings not inconsistent with this opinion.

APPENDIX B

Decision and Order of the United States District Court, Western District of New York, United States District Judge David G. Larimer, dated August 24, 1992.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MELINDA C. FRANK,

Plaintiff,

v.

HOWARD R. RELIN, Individually and in his capacity as the Monroe County District Attorney,

Defendant.

DECISION AND ORDER

86-CV-371L

This is a civil rights action brought under 42 U.S.C. § 1983, in which plaintiff, Melinda Frank, a former employee of the Monroe County District Attorney's Office, alleges that defendant, Howard Relin ("Relin"), the District Attorney of the County of Monroe, individually and in his capacity as District Attorney, fired her in violation of her First Amendment right to freedom of speech.

This case, which was commenced in April, 1986, has a long history before this court. Plaintiff initially alleged two causes of action against defendant only in his official capacity. Defendant then moved for summary judgment. In a bench decision on May 10, 1988 I dismissed plaintiff's second cause of action, a claim that Relin violated the Fourteenth Amendment by depriving plaintiff of a property interest without due process of law, and ordered a hearing to determine whether plaintiff's speech was entitled to first amendment protection under the principles set out in *Connick v. Myers*, 461 U.S. 138 (1983). After the hearing I found that plaintiff's speech was entitled to protection, and, therefore, denied defendant's motion for summary judgment on plaintiff's first cause of action. *Frank v. Relin*, 719 F.Supp. 138 (W.D.N.Y. 1989). Following that decision, plaintiff moved to amend her

complaint to add a claim against defendant in his personal capacity. I granted plaintiff's motion, and denied defendant's request to certify the decision for appeal. *Frank v. Relin*, No. 86-3711 (W.D.N.Y. September 4, 1991).

Defendant now moves for summary judgment dismissing the complaints against him in his official capacity and in his personal capacity, on the grounds that there is no basis for a claim of municipal liability and that he is entitled to qualified immunity. Defendant also moves to have my Decision and Order dated September 4, 1991, certified for appeal, pursuant to 28 U.S.C. § 1292(b).

After reviewing the record, I find that there is nothing in the record to support a claim of municipal liability. I also find that it was objectively reasonable for defendant to believe that he was not violating plaintiff's First Amendment rights when he fired her, and, therefore, that he is entitled to qualified immunity. Consequently, defendant's motion for summary judgment is granted.[1]

BACKGROUND

On November 16, 1985 plaintiff was fired from her job as the Victim-Witness Coordinator ("VWC") in the Monroe County District Attorney's Office Victim-Witness Center, a position she had held since December, 1981. Her discharge revolved around conversations she had during the summer of 1985 with Louis Pilato ("Pilato"), who was then a Special Assistant District Attorney.

This action stems from both the discharge and the conversations between plaintiff and Pilato. Because most of the facts of this case have been set forth at length in earlier decisions of this

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[1] Because by granting defendant's motions for summary judgment, I am dismissing this action in its entirety, defendant's motion to certify the Decision and Order dated September 4, 1991 is moot. I, therefore, decline to address the issues raised by that motion.

court, familiarity with which is assumed, *see Frank*, 719 F.Supp. 138, and *Frank*, No. 86-371L (W.D.N.Y. September 4, 1991), only those facts that are directly relevant to the pending motion will be recounted here.

Plaintiff's primary responsibilities as the VWC were to locate, subpoena, and counsel witnesses, and to schedule meetings between a witness and the Assistant District Attorney ("ADA") handling the particular case. On occasion, plaintiff also conducted in-person or over-the-phone interviews with potential witnesses. Plaintiff was instructed to bring to the attention of the ADA handling the case all of the information that she had gathered from the witnesses.

On three occasions between late-August and mid-September, 1985, plaintiff met with Pilato because she was concerned that certain ADAs were not following up on evidence that she had uncovered. Plaintiff's specific concerns related to three occasions when she gave what she felt was important evidence to the ADA working on the case, but was told to ignore the evidence. Plaintiff told Pilato that she was concerned that proper procedures were not being followed, and she asked him for advice as to how she should proceed. Pilato said that he was concerned that some of the evidence may be *Brady* material,[2] because the evidence may have been helpful to the defendant, and he indicated that he may have to do something about the situation. Plaintiff asked Pilato not to do anything without first telling her.

Pilato, who apparently believed that some improper activities were taking place, took matters into his own hands. Without telling plaintiff or discussing the matter with his superior, Relin, Pilato went to New York State Supreme Court Justice Robert Ken-

[2] Under *Brady v. Maryland*, 373 U.S. 83 (1963) the prosecutor is required to turn over all exculpatory information in its possession to the defendant.

nedy, the supervisory judge of the criminal courts in Monroe County, to tell him about one of the incidents which plaintiff had raised.[3]

After returning from the meeting, Pilato told plaintiff that he had spoken to Justice Kennedy. The news stunned plaintiff, because she had asked Pilato not to do anything without telling her first. Plaintiff then called the ADA she had been working with to tell him that Pilato had spoken to Justice Kennedy.

After meeting with Pilato, Justice Kennedy contacted Relin. Justice Kennedy questioned Relin about the incident, but Relin knew nothing about it. Relin subsequently conducted an investigation, and found out about the conversations between Pilato and plaintiff. Relin then met with plaintiff to discuss the matter with her. He later met with his staff to discuss plaintiff's situation. The consensus at the meeting was that although plaintiff's employment record had been exemplary, her behavior warranted terminating her employment. Defendant ultimately fired plaintiff.

Plaintiff subsequently commenced this action alleging that she was fired because of her conversations with Pilato and that her discharge violated her First Amendment right to freedom of speech.

DISCUSSION

Defendant now moves for summary judgment dismissing the claims against him in his official and personal capacities on the following grounds: First, that there is no evidence to show that

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[3] The particular incident related to a murder case involving a defendant named Larson. The disputed evidence concerned a witness's statement that Larson had been in the victim's house before the night of the murder, which could have explained why Larson's fingerprints were found in the apartment. The ADA told plaintiff not to call the witness in for an interview because he would have an investigator check to see whether a police report was made out concerning Larson's prior visit to the house.

plaintiff was fired pursuant to a municipal policy or custom; and second, that he is entitled qualified immunity in so far as he is sued in his personal capacity because it was objectively reasonable for him to believe that he was not violating plaintiff's First Amendment rights when he fired her.

I agree with both contentions.

A. *Summary Judgment Standard*

Summary judgment shall be entered if the pleadings and supplemental evidentiary materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue of material fact exists if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden of showing the absence of any genuine issue of material fact rests on the moving party, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and all ambiguities and inferences that may reasonably be drawn from the facts must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, a non-moving party must do more than show some metaphysical doubt as to the material facts; she must "come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (quoting Rule 56(e), Fed.R.Civ.P. (alteration in original)).

B. *Official-Capacity Suits*

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Supreme Court clarified the distinction between a personal-capacity and an official-capacity suit.

Personal-capacity suits seek to impose personal liability

> upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.

Id. at 165-66 (quoting *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690 (1978)) (citations omitted). Plaintiff here seeks to impose liability on defendant in both his personal and official capacities. Applying the principles in *Graham* to this case, it is clear that I must treat the claim against defendant in his official capacity as a claim against the government entity of which he is an agent, and not as another claim against defendant in his personal capacity.

Under the law of the state of New York, the District Attorney's Office is a local rather than a state office. *See Kelley v. McGee*, 57 N.Y.2d 522, 534-35 (1982) (office of district attorney is a local as opposed to a state office). As the District Attorney for Monroe County, defendant is, therefore, an agent of that County. Consequently, the claim against defendant in his official capacity is actually a claim against Monroe County.

It is well-settled that "municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.' " *City of St. Louis v. Proprotnik*, 485 U.S. 112, 123 (1988) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)). The Supreme Court has included within the meaning of an officially sanctioned municipal act a decision made by a municipal official on a single occasion if that municipal official has final policy-making authority. *Id.* The issue of

whether a particular official has final policy-making authority is a question of state law. *Id.*

The alleged constitutional violation at issue here — termination in violation of plaintiff's First Amendment rights — involved a single act committed by defendant. Defendant contends that under New York State and Monroe County law, he does not have final policy-making authority over employment decisions, and, therefore, that municipal liability will not lie. He contends that the Monroe County Civil Service Commission possesses final decision-making authority over all employment and personnel decisions for Civil Service employees, ~~such as plaintiff.~~

I need not labor over this issue, however, because plaintiff's responding papers make clear that she does not wish to sue Monroe County. On page two of plaintiff's Memorandum of Law in Opposition to Defendant's Final Motion for Summary Judgment it states that "plaintiff has not sued any municipality, but has only sued the defendant Relin, in his individual and official capacities." (Pl.'s Mem. at 2). Later, on page three, it states that it is unnecessary to decide the issues relating to municipal liability because "[p]laintiff has not sued the municipality. She has not named the County of Monroe as a party defendant." (Pl.'s Mem. at 3). Finally, on page four it states that "plaintiff simply notes that she is not seeking to hold the County of Monroe liable for Relin's actions; rather, she is simply seeking to hold the defendant liable, in his official and individual capacities." (Pl.'s Mem. at 4).

Plaintiff contends that an official-capacity suit is simply another way of pleading a claim against a government official in his personal capacity. This contention is without merit; a suit against an official in his official capacity is a suit against the municipality of which he is an agent. *See Graham*, 473 U.S. 159. I am, therefore, treating plaintiff's admission that she does not wish to sue Monroe County, as a withdrawal of her claim against defendant

in his official capacity. Consequently, defendant's motion for summary judgment dismissing the claim against him in his official capacity is granted.[4]

C. *Qualified Immunity.*

"The Supreme Court has expressly encouraged the use of summary judgment when qualified immunity is raised as a defense. The objective reasonableness defense was designed to facilitate this summary device as a means quickly to extricate government officials from defending insubstantial suits." *Cartier v. Lussier*, 955 F.2d 841, 844 (2d Cir. 1992). If, however, material issues of fact are genuinely disputed, then the qualified immunity issue may not be decided on summary judgment. *Id.*

In this action, the material facts relating to defendant's claim of qualified immunity are not genuinely disputed, and, therefore, the qualified immuity issue can be decided on this motion. Based on the undisputed material facts in the record, I find that defendant is entitled to qualified immunity because it was objectively reasonable for him to believe that he was acting lawfully when he fired plaintiff.

Qualified immunity protects a public official from liability arising from the performance of discretionary functions if that performance does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether an official is entitled to qualified immunity generally turns on whether it was objectively legally reasonable for the official to believe that he was acting lawfully. *Anderson v. Creighton*, 483 U.S. 635, 639

[4] Even if plaintiff did not intend to withdraw her claim against Monroe County, the fact that she has offered no evidence to support a claim that the alleged constitutional violation was a result of municipal policy or that defendant is a policy-making official is fatal to her suit against defendant in his official capacity.

(1987). The qualified immunity inquiry is concerned with only the objective legal reasonableness of the defendant's actions; his subjective intent is irrelevant. *Id.* at 641; *accord Cartier*, 955 F.2d at 846 ("subjective inquiry into an official's personal belief is rejected in favor of an objective analysis of what a reasonable officer in defendant's position would believe.").

Relin, relying principally on *Giacalone v. Abrams*, 850 F.2d 79 (2d Cir. 1988), contends that in 1985, the year that he fired plaintiff, it was objectively reasonable for him to believe that firing plaintiff for her conversations with Pilato would not violate her First Amendment rights.[5] In 1985, it was clearly established that the First Amendment protects a government employee from discharge for speech upon matters of public concern. *See Vasbinder v. Ambach*, 926 F.2d 1333, 1341 (2d Cir. 1991) (citing *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 46 (2d Cir. 1983)). However, it was also clearly established that not all speech by a public employee is entitled to First Amendment protection.

To be accorded First Amendment protection, the employee's speech must involve an issue of public concern, and the interests of the employee, as a citizen, in speaking freely on that issue must outweigh the government's interest, as an employer, in promoting

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[5] Relying on the mixed-motive analysis established in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), Relin also contends that he is entitled to qualified immunity because he fired plaintiff not because she spoke to Pilato, but because she withheld from her superiors the information she ultimately disclosed to Pilato, and that it was objectively reasonable for him to believe that he could fire plaintiff on this ground. Summary judgment may not be granted on this ground. Plaintiff has offered sufficient evidence to raise a genuine issue of fact regarding whether Relin fired her because of her conversations with Pilato. In fact, Relin, himself, has stated that he would not have fired plaintiff if she had not expressed her concerns to Pilato. (Hearing Transcript of February 13, 1989 at 46-47). Consequently, the issue of whether defendant would have fired plaintiff had she not spoken to Pilato or the issue of whether plaintiff's failure to disclose the information to her superiors established an independent ground for firing her are questions of fact that cannot be resolved on summary judgment.

the efficiency of the public services it performs. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *accord Piesco v. City of New York, Dep't of Personnel*, 933 F.2d 1149, 1155-56 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 331 (1991). Whether an employee's speech meets these criteria is a question of law. *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983). However, with a qualified immunity inquiry the issue is not whether an employee's speech is actually entitled to First Amendment protection, but whether a reasonable official would have known that the speech was entitled to such protection.

Accordingly, my earlier decision, which dealt only with the threshold issue of whether plaintiff's speech was entitled to First Amendment protection, *Frank*, 719 F.Supp. 138, is not a bar to granting defendant qualified immunity from suit. The defense of qualified immunity is not destroyed simply because a court, with hindsight, determines that a constitutional violation occurred. The qualified immunity inquiry is an *ex ante*, not an *ex post*, inquiry, made from the perspective of a reasonable public official standing in defendant's place at the time of the disputed act. *See Warren v. Dwyer*, 906 F.2d 70, 75 (2d Cir.), *cert. denied*, 111 S. Ct. 431 (1990) (qualified immunity inquiry in probable cause action considers reasonableness from point of view of officer on the scene). Qualified immunity is available even to those who reasonably but *mistakenly* conclude that they are acting lawfully. *Anderson*, 483 U.S. at 641. Thus, even if the evidence, now available, supports a finding that plaintiff's speech was constitutionally protected, defendant is still entitled to qualified immunity if the facts confronting him at the time he fired plaintiff would have led a reasonable district attorney to conclude the firing was lawful, under clearly established First Amendment principles.

Framed at a proper level of generality, *see Mozzochi v. Borden*, 959 F.2d 1174, 1179 (2d Cir. 1992) (qualified immunity issue must be framed at proper level of generality), the qualified immunity

inquiry in this case is whether, in light of the clearly established law in 1985 and the circumstances that confronted Relin when he fired plaintiff, a reasonable district attorney could have believed that plaintiff's speech did not touch on a matter of public concern, or that under the *Pickering* balancing-of-interests analysis, plaintiff's interests in speaking out, as a citizen, were outweighed by the interests of the District Attorney's Office, as an employer, in promoting the efficiency of its prosecutorial function.

When he fired her, Relin knew that plaintiff's speech involved allegations that touched on issues relating to possible *Brady* material. A reasonable district attorney would have known that such speech related to a matter of public concern. Consequently, defendant is not entitled to qualified immunity on the ground that he could not have reasonably known that plaintiff's speech involved a matter of public concern. However, the fact that Frank's speech touched on matters of public concern "is only a threshold issue that establishes that [she] had 'some' First Amendment interest at stake". *Giacalone*, 850 F.2d at 86. That does not end the inquiry. The weight to be accorded to an expression by a public employee varies depending on a multitude of factors. For example, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150; *accord Giacalone*, 850 F.2d at 86. Likewise, the "manner, time and place" that the employee chose to engage in the free expression also varies the State's burden. *Connick*, 461 U.S. at 152-53.

When these factors are applied to the qualified immunity inquiry, the following principle emerges: both the nature of the employee's expression and the time, place and manner the employee chooses to engage in that expression vary the extent to which it was reasonable for the public official to believe that he is justified in discharging the employee. *See Giacalone*, 850 F.2d at 87-8. In this case, the nature of plaintiff's speech, as it appeared in 1985,

and the manner in which plaintiff chose to exercise her First Amendment rights made it reasonable for defendant to believe that the interests of the District Attorney's Office in promoting the efficient performance of its prosecutorial function outweighed plaintiff's interests in speaking to Pilato, and, therefore, that firing plaintiff was lawful under the *Pickering* balancing-of-interests analysis.

It is significant that plaintiff's speech raised, at most, only the specter of a possible *Brady* violation.[6] Plaintiff made no allegations then, or now, to suggest that she believed that certain ADAs in the District Attorney's Office were involved in an attempt to deprive criminal defendants of access to *Brady* material or an attempted cover-up of past wrong-doings. Thus, at most, plaintiff's speech concerned a dispute over the proper interpretation of the *Brady* doctrine, a legal issue over which reasonable minds could differ. As such Relin was reasonable in believing that the speech was not entitled to much weight in the *Pickering* balancing-of-interests analysis. *See Giacalone*, 850 F.2d at 86 (speech which expressed differences of opinion on legal strategy was not entitled to much weight). It is also significant that plaintiff was not a lawyer, because even if I assume that plaintiff intended to allege that ADAs were failing to disclose *Brady* material, plaintiff's status as a non-lawyer made it reasonable for Relin to give plaintiff's opinion on a legal matter, and her First Amendment interests in expressing that opinion, little weight under the *Pickering* analysis.

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[6] In fact, based on her testimony at the hearing held in connection with defendant's first motion for summary judgment, it appears that plaintiff did not speak to Pilato because she believed that *Brady* material was being concealed, but rather because she was concerned that proper procedures were not being followed, and that the ADA who had asked her to ignore the evidence could be surprised in court by evidence that was overlooked during the investigation. (Tr. of August 11, 1988 at 51-2). Plaintiff, herself, admitted that she did not know about the *Brady* doctrine until Pilato told her about it. (Hearing Transcript of August 11, 1988 at 19, 36-7).

In contrast, it was objectively reasonable for Relin to believe that the interests of the District Attorney's Office in promoting the efficiency of its prosecutorial services were high, and that plaintiff's speech and conduct had an adverse impact on these interests. Both *Pickering* and *Giacalone* stand for the proposition that "maintenance of discipline and preservation of close working relationships involving personal loyalty or confidence, can be relevant to the employer's interest". *Giacalone*, 850 F.2d at 87; *see Pickering*, 391 U.S. at 520. "In evaluating the relative weight of the employer's and employee's interests, [courts] also 'consider whether the speech impaired the employee's ability to perform his duties, disrupted working relationships requiring personal loyalty and confidence, or otherwise impaired the regular operation of the employing agency.' " *Giacalone*, 850 F.2d at 85 (quoting *Rookard*, 710 F.2d at 46).

The need for confidentiality and personal loyalty, as a foundation for establishing good working relationships, is especially critical to the proper functioning of a district attorney's office. The nature of the work done in a prosecutor's office is such that prosecutors must be able to trust each other and their staff in order to operate effectively. Breaches of confidentiality, loyalty, or trust, whether real or imagined, pose a serious threat to the efficient operation of a district attorney's office, and can undermine the effectiveness of the prosecutorial services it provides.

In this case, it is not genuinely disputed that plaintiff's decision to speak to Pilato, rather than to the ADA she was working with, to her supervisor, or to Relin, adversely affected the working relationships in the District Attorney's Office. According to George Sofia, the Chief of District Attorney Administration, after it became known that plaintiff had spoken to Pilato, senior members of the Relin's staff "determined that Mrs. Frank could no longer be trusted; that her position was a key one, and she would be working with trial attorneys, and it was determined that she

couldn't — her position was too important, and she could no longer be trusted." (Tr. of February 13, 1989 at 14). The staff members expressed these concerns to Relin.

In light of the concerns that were expressed to him, it was objectively reasonable for Relin to believe that interests of the District Attorney's Office were in jeopardy, and, therefore, that he could lawfully discharge plaintiff under the *Pickering* balancing-of-interests analysis. Even if the staff member's concerns were misguided — or even mistaken — the fact that Relin was confronting a situation in which members of his staff expressed concerns over plaintiff's trustworthiness made his own beliefs regarding the interests of the District Attorney's Office reasonable. *Cf. Anderson* 483 U.S. at 441 (defendant entitled to qualified immunity if he reasonably but mistakenly concluded that probable cause existed); *Warren*, 906 F.2d at 75 (defendant is entitled to qualified immunity even if he mistakenly believed probable cause existed if the mistake was reasonable).

I am guided to some extent by *Giacalone v. Abrams*, 850 F.2d 79. In *Giacalone*, plaintiff, an Assistant Attorney General in the New York State Department of Law, brought suit, under § 1983, alleging that he was discharged because he had engaged in speech protected by the First Amendment. The defendants moved for summary judgment dismissing the action on qualified immunity grounds, and the district court denied the motion. The Second Circuit reversed, holding that under the *Pickering* balancing-of-interests analysis it was reasonable for defendants to conclude that plaintiff's First Amendment interests were outweighed by the disruption caused by his actions. *Id.* at 88.

Giacalone and this action are similar in several critical respects. First, the speech in *Giacalone*, like the speech here, concerned a difference of opinion over a legal issue that was open to interpretation. Next, the speech in *Giacalone*, like the speech here, raised little in the way of allegations of wrong-doing. Finally, the plain-

tiff in *Giacalone*, like plaintiff here, chose to express his concerns in a manner that threatened the efficient operation of the employer.

This case is distinguishable from *Vasbinder v. Ambach*, 926 F.2d 1333, and *Piesco v. City of New York Dep't of Personnel*, 933 F.2d 1149, two recent First Amendment cases, in which the Second Circuit rejected claims of qualified immunity. Unlike the speech in *Vasbinder*, which involved a plaintiff who had spoken to the FBI during its investigation of plaintiff's employer, or the speech in *Piesco*, which involved a plaintiff who testified before a legislative committee investigating the police department, the speech in this case was not so plainly entitled to strong First Amendment protection that a reasonable district attorney would have known that it would be unlawful to fire plaintiff for engaging in the protected speech.

After considering the evidence, I believe that defendant has demonstrated that he acted reasonably under the circumstances. Some might differ as to the wisdom of firing a long-term employee such as Frank; that disagreement, however, is not a basis to deny Relin qualified immunity. Qualified immunity shields all who act reasonably, even if mistakenly, under the circumstances; it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). In this case, the record simply does not support a finding that defendant was incompetent or that he knowingly violated the law. The law, clearly established at the time, was such that a reasonable district attorney could have believed that the interests of the District Attorney's Office outweighed plaintiff's First Amendment interests, and, therefore, that discharging plaintiff was lawful.

Defendant's motion for summary judgment dismissing the claims against him in his personal capacity on the grounds of qualified immunity is, therefore, granted.

D. *Motion to Certify*

Because by granting defendant's motion, I am dismissing this action in its entirety, defendant's motion to certify this Court's Order of September 4, 1990 is moot. I, therefore, decline to address the issues raised by that motion.

CONCLUSION

Defendant's motions for summary judgment dismissing the claims against him in both his official and personal capacities are granted, and the complaint is dismissed.

IT IS SO ORDERED.

s/ David G. Larimer

DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: August 24, 1992
Rochester, New York

APPENDIX C

Decision and Order of the United States District Court, Western District of New York, United States District Judge David G. Larimer, dated September 4, 1991.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MELINDA C. FRANK,

Plaintiff,

v.

HOWARD R. RELIN, in his official capacity as District Attorney of Monroe County,

Defendant.

DECISION AND ORDER

Civ. 86-371L

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. Plaintiff Frank alleges that the defendant terminated her employment in retaliation for her exercise of rights under the First Amendment. Pending before me is defendant's motion to dismiss plaintiff's amended complaint on statute of limitations grounds. For the reasons described below, defendant's motion is denied.

FACTS

Plaintiff originally filed her complaint on April 21, 1986, naming as the sole defendant Howard R. Relin, in his official capacity as District Attorney of Monroe County. In a bench decision on May 10, 1988, I granted in part defendant's motion for summary judgment, and dismissed plaintiff's second cause of action. On August 1, 1989, I denied the remainder of the motion and declined to dismiss the first cause of action in the complaint.

On April 2, 1991, I granted plaintiff leave to file and serve an amended complaint. Plaintiff filed her amended complaint on April 5, 1991. The amended complaint is identical to the original one, except that Relin now is named as a defendant in his individual, as well as official, capacity.

Defendant moves to dismiss the amended complaint to the extent that it names him as an individual defendant on the ground that this "claim" is barred by the three-year statute of limitations.[1]

Plaintiff maintains that the amended complaint is not time-barred because Federal Rule of Civil Procedure 15(c) allows the amended complaint to relate back in time to the filing of the original pleading in 1986. Although Relin concedes that the original complaint was filed timely, he disputes the application of Rule 15(c), maintaining that the amended complaint may not relate back in this instance.

DISCUSSION

Federal Rule of Civil Procedure 15(c) provides, in full:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

[1] The parties agree that a three-year statute of limitations applies to the § 1983 actions brought in the state of New York.

The parties have framed the issue here as one relating to the addition of a new "party" under Rule 15(c). The parties therefore spent considerable time discussing the factors set out in 15(c) and the Supreme Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986).

In my view, on the facts of this case the matter should be viewed as the simple addition of a new claim that arose out of the conduct set forth in the original complaint. In that circumstance, the first sentence of Rule 15(c) clearly allows the amendment to relate back to the date of the original pleading. In my view, under these circumstances, since the same person, Howard Relin, is before the court, it would elevate form over substance to consider this amendment as bringing a new "party" into the lawsuit.

The rules for adding a new "party" are strict and are set out in detail in Rule 15(c) and in the *Schiavone* case. It seems to me, however, that the rationale for the rule as it relates to the addition of new parties simply does not apply when the *same* person is sued but under a different theory or a new claim. That is all that has occurred here. The proof and the evidence will be substantially the same. It is true that there might be different elements necessary to prove the claim against Relin in his official capacity, but that should not affect the ability of plaintiff to amend the complaint to prosecute all claims and theories of liability against one individual, Relin.

In *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), the Supreme Court discussed the elements necessary to establish personal liability under § 1983 as opposed to liability in an official capacity suit. To establish personal liability under § 1983, "it is enough to show that the official, acting under color of state law, caused the deprivations of a federal right," *id.*, at 166. In an official capacity suit, however, the plaintiff must prove in addition

that the action was taken pursuant to an official policy or custom. *See id.*

Relin claims, in the most conclusory terms, that he is prejudiced by this shift in theory. I believe that the facts, however, do not support this claim. Relin makes no specific claim of prejudice and in light of the nature of the case, it is difficult for the court to see how there can be any prejudice. There is no evidence that had he been sued originally in his individual capacity, Relin would have conducted different discovery or would have taken different steps to secure evidence germane to his defense. There is no indication that Relin would have defended this case differently. Relin has vigorously defended this suit and has testified personally at a hearing on the motion to dismiss the complaint. The facts underlying the dispute are rather simple and have been set forth already in much detail during the hearing relating to the motion to dismiss.

In my view, the factual defense in this case will be precisely the same regardless of the capacity in which Relin is sued.

Even under *Schiavone*, the true linchpin of Rule 15(c) seems to be the notice received by the defendant and the opportunity provided to defend the action. 477 U.S. at 31. There is no doubt that Relin had both notice and an opportunity to defend this lawsuit from the day it was filed.

In my view, plaintiff does not seek to add a new party as a defendant, but instead merely seeks to change the capacity in which the original defendant was sued. Commentators have noted that "an amendment by which plaintiff seeks to change the capacity in which defendant is being sued . . . does not change the parties before the court and will relate back." 6A C. Wright, A. Miller, M. Kane, *Federal Practice & Procedure*, § 1498, at 134; *see also* 3 Moore's *Federal Practice*, ¶ 15-15[4.-1] (2d ed. 1989). The new complaint simply alters the legal theory under which liability

against Relin may be imposed. *See DeMalherbe v. Int'l Union of Elevator Constructors*, 449 F. Supp. 1335, 1354-55 (N.D. Cal. 1978) (amendment adding *Bivens* claim to complaint alleging Title VII and § 1983 violations relates back where introduction of new claim creates no prejudice). *Smith v. Guaranty Service Corp.*, 51 F.R.D. 289 (N.D. Cal. 1970) (amendment to complaint in securities action, alleging active wrongdoing against defendant previously named as mere stakeholder, relates back under 15[c]). Because this case does not truly add a new defendant, but merely asserts new theories of liability against the party already before the court, this case is distinguishable from those relied upon by defendant. *See Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99 (1st Cir. 1979).

In both those cases and in others which deny relation back, the new complaint sought to bring before the court new parties who previously had no involvement whatsoever in the lawsuit. Here, by contrast, Frank seeks to change the legal theory under which a previously named defendant is sued. It is well established that an amended complaint that merely changes the legal theory on which an action is based relates back so long as the "factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." 6A Wright & Miller, *supra*, § 1497 at 94 (quoted with approval in *FDIC v. Bennett*, 898 F.2d 477 [5th Cir. 1990]). Even if, the new complaint alleges new *conduct* on defendant's part, if the new allegations concern the same factual transaction or occurrence, the amendment relates back. *See Bennett*, 898 F.2d at 479.

Because the amended complaint does not substitute or add a new party, but merely changes the theories asserted against the original defendant, the second sentence of Rule 15(c), which requires the showing set forth in *Schiavone*, simply does not apply. *Cf. Phelps v. Wichita Eagle-Beacon*, 632 F. Supp. 1164, 1171 (D.

Kan. 1986) (amendment adding *RICO* claim to civil rights complaint relates back even though it alleges new *facts* and legal theories against defendant, so long as claim arises out of same transaction or occurrence alleged in original complaint).

In sum, because I find that Relin is in no way prejudiced in his ability to defend this action by plaintiff's amendment, I decline to dismiss the amended complaint on the ground that it is barred by the statute of limitations. Because the amendment simply changes the capacity in which Relin is sued, rather than adding a completely new party, Rule 15(c) allows the amendment to relate back to the time the original complaint was filed.

CONCLUSION

Defendant's motion to dismiss the amended complaint is denied.

IT IS SO ORDERED.

s/ David G. Larimer

DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
September 4, 1991.

APPENDIX D

Decision and Order of the United States District Court, Western District of New York, United States District Judge David G. Larimer, dated August 1, 1989.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MELINDA C. FRANK,

Plaintiff,

v.

HOWARD R. RELIN,

Defendant.

DECISION AND ORDER

Civ. 86-371L

BACKGROUND

This is a civil rights action pursuant to 42 U.S.C. § 1983 by Melinda C. Frank (Frank) a former employee with the Monroe County District Attorney's Office against Howard R. Relin (Relin), Monroe County District Attorney for wrongful termination of plaintiff's employment.

Frank was employed by the Monroe County District Attorney's Office as a Victim-Witness Coordinator from December 1981 to November 16, 1985 when she was fired by District Attorney Relin. Plaintiff claims that she was fired in violation of her constitutional rights, that is, that she was fired for exercising her First Amendment right of free speech. It is not disputed that Frank was fired because of private conversations she had with Assistant District Attorney Louis Pilato concerning cases handled by other assistant district attorneys. Plaintiff claims that her speech with Pilato was "protectable" speech under the First Amendment and that her interest in exercising her constitutional rights outweighed any interest that the District Attorney had in the administration of his office.

Defendant moved for summary judgment dismissing the complaint. In a bench decision rendered May 10, 1988, I granted defendant's motion for dismissal of plaintiff's second cause of action. As to plaintiff's first cause of action, that her dismissal was in violation of her First Amendment right of free speech, I ordered a hearing to determine under principles set out in *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7 (1983) whether the speech in question was "protectable" speech. The court held three days of hearings in which Frank, Relin, Pilato and George R. Sofia, an Assistant District Attorney in charge of administration, testified.

For the reasons discussed below, defendant's motion for summary judgment dismissing plaintiff's first cause of action is denied.

FACTS

As Victim-Witness Coordinator, Frank's primary responsibility was to work with witnesses in preparation for trial in connection with criminal cases handled by the several assistant district attorneys in the office. Frank was the only person performing that function when she started in 1981. When she was fired there were five people in the office and approximately twenty volunteers. In her role she would help the attorneys contact witnesses and would help the witnesses deal with the vagaries of the criminal justice system. She often would participate in attorney-witness interviews in preparation for trial.

Frank testified about two incidents concerning two prosecutors that prompted her conversations with Pilato.

In September 1985, Frank had a conversation with an unnamed police officer who asked her what Sam Tibone, a victim, was doing in the DA's office. The officer advised her that Tibone

had an extensive criminal record. Frank related that information to the ADA handling the case. She testified that the ADA replied "don't tell me about it now, wait until after the trial." Frank did not pursue the matter.

In another incident, Frank claims that she learned of information that would tend to exculpate or at least be useful to a defendant named Larson who had been charged with homicide. Frank testified that she learned that an acquaintance of the victim would testify that Larson had been to the victim's apartment *prior* to the murder and had attempted to get into the apartment. She testified that when she advised the ADA in charge of the case of that fact, he told Frank not to bring the witness in for an interview. Rather, he would have an investigator check out whether any police report was made concerning this alleged incident. Frank testified that the ADA said that this information might weaken the prosecution's case because it would explain why the defendant's fingerprints were in the victim's apartment.

The day after the conversation concerning the Larson case, Frank went to see ADA Pilato and told him what had happened. This was the first of three private conversations that she had with Pilato. District Attorney Relin testified that it was the fact that she went to see Pilato on these three occasions that caused him to fire her.

Pilato was a senior, experienced ADA. He had been in the office for eleven years and he testified at the hearing that his title in August 1985 was Special Assistant District Attorney in Charge of the Investigative Unit. He estimated that he supervised 20-30 people in the DA's office although he had no supervisory responsibility over the Victim-Witness Bureau.

In her private conversation with Pilato she relayed to him all of the circumstances of her conversations and she told him that she was very concerned because she believed that important informa-

tion was being ignored or not pursued by the two prosecutors in important criminal prosecutions. She told Pilato that she was not sure what information, especially information favorable to the defense, should be given to the prosecutors. At the hearing, Pilato confirmed the nature of these conversations with Frank. Frank was concerned because the prosecutor seemed to be telling her to forget or ignore evidence that could help the accused and hurt the prosecution's case.

Pilato told Frank to check back with the ADA on the Larson case to make sure that she understood his instructions. He also told her that he, Pilato, could not simply ignore her complaint because it seemed to implicate a *Brady* violation.[1] Pilato confirmed that Frank did not ask him to do anything about the matter.

Pilato testified that because of his experience it was common for staff and other prosecutors to come to him for advice and consultation on a wide range of matters. He had worked with Frank on other cases and he had previously discussed with her matters concerning the DA's office and the proper way to handle cases.

About a week later, Frank had a conversation with Pilato and advised him that there were no new developments. A short time later, however, in late August or early September 1985, Frank received additional information which concerned her very much and occasioned her third conversation with Pilato. This incident concerned the same murder defendant Larson.

The ADA in charge had asked Frank to contact a certain witness in the case. The witness informed Frank that on the day of the homicide, he had seen the defendant and the defendant said that he was "on Black Velvet and acid." Frank alleges that when she related this information to the ADA, he told her not to bring

[1] *Brady v. Maryland*, 373 U.S. 83 (1963) stands, of course, for the general proposition that a prosecutor is required to turn over exculpatory information relating to guilt or innocence to the defense.

the witness in because her statement would only help the defense's case. Frank testified that she was concerned because she felt that his response was "peculiar" in light of his normal practice to obtain all available information in a case.

Frank again spoke to Pilato about the matter. She claimed that on that particular day neither Relin nor the Chief Trial Assistant, Mary Ann Hawco, were available. She stated that she went to Pilato because, in her view, pertinent information concerning a homicide was not being properly investigated. Pilato confirmed Frank's recount of the meeting.

Without Frank's request or knowledge, however, Pilato immediately went to Supreme Court Justice Robert Kennedy, Supervisory Judge of the criminal courts in Monroe County, to report the substance of his conversations with Frank concerning the alleged misconduct.

When Frank learned of Pilato's actions, she was upset with him because he had promised to consult with her before taking any action. Apparently, Frank called the ADA in question about Pilato's report to Justice Kennedy. Kennedy also apparently contacted Relin and eventually both Frank and Pilato were fired for their actions.

Relin testified that it was his "policy" that employees should discuss "problems" only with their supervisors or with him. When he first met with Frank, he told her that her failure to discuss her concerns with him or another "supervisor" was a serious error in judgment.

Relin claimed that he was not concerned with the content of Frank's communications to Pilato, but he was concerned with the fact that she had chosen Pilato instead of her supervisors, apparently either Mary Ann Hawco, the Chief Trial Assistant or Sofia.

Sofia testified that when Frank first started she was under his "control" but as the job developed, she was controlled more by Hawco. Sofia, however, testified that he knew of no formal office policy or procedure for airing the types of concerns and complaints voiced by Frank to Pilato.

It is clear that the only reason for Frank's dismissal was her conversations with Pilato. Both Sofia and Relin conceded this. Relin testified that his primary concern and the reason for Frank's dismissal was her failure to vent her concerns with the proper people and the fact that she discussed one prosecutor's actions with another prosecutor. He viewed Frank's actions as "reprehensible" although not as bad as Pilato's which he viewed as the worst conduct he had seen in his seventeen years in the DA's office.

Aside from this episode, Frank appears to have been an exemplary employee, and she received favorable ratings for 1982-1984. In fact, both Sofia and Relin wrote her favorable letters of recommendation after her firing. Sofia's letter recommended Frank "without reservation." Relin's letter described her as "a real asset to the Monroe County District Attorney's Office," and he gave her the "highest recommendation" for future employment.

During his conversations with Frank immediately prior to her discharge, Relin admitted that Frank told him of her concerns concerning the apparent failure of the prosecutors to develop and pursue seemingly exculpatory information. In his discussions with Frank, Relin admitted that she used the term "*Brady*" although he believed that she did not have a clear understanding of the *Brady* doctrine but had merely picked up the phrase from Pilato.

Discussion

Frank claims that she was fired in retaliation for exercising her right of free speech in connection with a matter of public concern, that is, the improper investigation of serious criminal cases by the D.A.'s office. District Attorney Relin claims he fired Frank for insubordination and that decision was his prerogative especially concerning an employee like Frank who served at the pleasure of the D.A. Analysis of this issue must begin with certain well-established principles.

A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. *Connick, supra*, 461 U.S. at 140, 103 S.Ct. at 1686. A state "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.* 461 U.S. at 142, 103 S.Ct. at 1687. Furthermore, a state employee enjoys First Amendment protection even if he does not publicly express his views, but privately communicates them to his employer. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 46 (2d Cir. 1983).

The question of whether expression by a state employee is constitutionally protected involves striking a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687, *quoting Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284, 97 S.Ct. 568, 574 (1977).

The threshold inquiry in applying the balancing test is whether Frank's expression constituted speech on a matter of public con-

cern. *Rankin v. McPherson*, 107 S.Ct. 2891, 2896 (1987); *Connick*, 461 U.S. at 140, 103 S.Ct. at 1686. In other words, was the speech "protectable" speech. The question of whether expression addresses a matter of public concern must be determined by the "content, form and context of a given statement," as revealed by the entire record. *Connick*, 461 U.S. at 147-148, 103 S.Ct. at 1690.

"When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. Generally, when a public employee speaks only of matters of a personal interest rather than as a citizen upon matters of public concern, the propriety of the State's action should not be reviewed in a federal court. *Id.*

The determination of whether a public employee's speech is constitutionally protected is one of law, not fact. *Connick*, 461 U.S. at 148 n.7, 103 S.Ct. at 1690 n.7.

Defendant argues that plaintiff does not have a valid First Amendment cause of action because her "speech" was not about a matter of public concern, but her personal performance in the DA's office. Defendant contends that plaintiff was disappointed that the attorneys she approached did not embrace her suggested strategies for case management.

I have considered the content, form and context of Frank's statements and it is clear that they relate to a matter of public concern. Frank's statements to Pilato, a senior, experienced assistant DA who served in a supervisory capacity, related to the efficient and effective functioning of the office and to assuring that relevant, material evidence is fully developed and made available to the prosecution and the defense to guarantee that defendants ob-

tain a fair trial. Clearly, these issues are matters of legitimate public concern. Undoubtedly, information that a prosecution witness has an extensive criminal record, that a defendant may have had access to a victim's home prior to a homicide and that the defendant may have been mentally impaired due to drugs is material and significant to both the prosecution and the defense. Such information, which might exculpate the defendant or aid in his defense in some way, is especially important to the defense. It is clear that the D.A.'s handling of this type of information is, and should be, a matter of deep public concern.

This was not just a personal employment dispute. Although Frank was initially concerned about her role in the DA's Office, the evidence adduced at the hearing establishes that she did not merely complain out of dissatisfaction that assistant DA's had ignored her input. Rather, she was concerned that in disregarding relevant information the prosecutors may not have been fully prepared for trial because they had not dealt with information that might be adduced at trial, notwithstanding their desire to ignore such information. A significant part of her concern was caused by the nature of the information that the prosecutors were allegedly discouraging her from collecting. This related to evidence that even a lay person would understand could be exculpatory or helpful to the defense. Certainly, after her initial conversation with Pilato during which she had been generally advised of the nature of the *Brady* doctrine, Frank sought to inform a senior member of the office that she was concerned that certain assistant DA's may not have been discharging their duties in investigating and prosecuting criminal cases.

The public interest in seeing that criminal cases are properly investigated and prosecuted and in guaranteeing that all defendants receive a fair and speedy trial is beyond dispute. If prosecutors told Frank to disregard evidence that would weaken the prosecution's case, and implicitly aid the defense, this would have

violated their legal and ethical obligations. Such conduct would constitute a breach of public trust in the DA's office and would seriously undermine the fair administration of the criminal justice system.[2]

Although Frank was concerned about her role and responsibilities, I find that she was primarily concerned about what she perceived to be prosecutors' seeming indifference to evidence which may have been favorable to the defense. The issue of whether assistant DA's may have been suppressing relevant evidence that might be favorable to the defense is a matter of interest to the community upon which it is essential that employees of the DA's office be able to speak about freely without fear of retaliatory dismissal. Certainly a member of the public could comment on these lapses; a member of the D.A.'s office should have the same right of comment.

Therefore, I conclude that Frank's "speech" relating to her concerns about whether the DA's office was discharging its duties in investigating and prosecuting criminal cases was a matter of public concern.

Because Frank's speech addressed a matter of public concern, the court must now balance her interests in making her statements against the State's interest in effectively and efficiently carrying out its public duties. The Supreme Court has stated that:

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient opera-

---

[2] In deciding whether Frank's speech was a matter of public concern, the court must examine the content of her speech. I conclude that her speech is protectable. This is not, however, the forum to determine whether or not the prosecutors said what Frank claimed that they said. My determination here that Frank's speech is constitutionally protected does not necessarily mean that Frank's charges have been proven.

> tion and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 U.S. at 151, 103 S.Ct. at 1692. Pertinent considerations in striking the balance are "whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 107 S.Ct. at 2899.

"[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692. In the instant case, Frank's speech involved a matter of great importance to the public. Therefore, defendant must make a strong showing that her conduct hindered the efficient operation of the DA's office.

There has been no demonstration that Frank's voicing of her concerns that certain assistant DA's may have been disregarding relevant evidence seriously impaired her working relationship with other staff and attorneys in the office or impeded her ability to perform her job. Further, there is no evidence that Frank was a "disruptive or otherwise unsatisfactory" employee. In fact, in a letter of reference, defendant Relin described Frank's contributions to the office as follows:

> She has made trying felony cases a pleasure for many of the attorneys within the Monroe County District Attorney's Office. On a personal level, I have found Ms. Frank to be a person who seeks out assistance and advice and a person who has an overriding concern for her office, and for the reputation of that office. Ms. Frank has been a real asset to the Monroe County District Attorney's Office. . . .

Plaintiff's Exhibit 5. In his testimony, Relin did not cite any con-

cern that Frank's conduct would hinder the efficient operation of the DA's office. Rather, he testified that the *only* reason for Frank's discharge was that she spoke to Pilato rather than her immediate supervisor or someone else in the chain of command.

The testimony reveals that although Pilato had no supervisory responsibility for the Victim-Witness Bureau, he was a senior, experienced attorney who had supervisory responsibility for 20-30 people in the Investigative Unit. In light of Pilato's seniority and experience, it was common for staff and other attorneys to consult with him and seek his advice on matters. There is no evidence that Frank violated an established office policy or procedure in consulting with Pilato. Rather, Relin's reaction to Frank's discussions with Pilato appear to be nothing more than an ad hoc response after learning that persons outside the office had been informed of Frank's statements.

It is also relevant that Frank's speech was not made in public, but in private conversation with a supervisory employee in the office. There is no evidence that she "went public" in order to embarrass the office. There is no evidence that she knew of or acquiesced in Pilato's plans to divulge her statements to persons outside of the office.

"The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." *Rankin*, 107 S.Ct. at 2900.

Defendant has not made a sufficient showing that Frank's conduct was an act of insubordination that would have a serious adverse impact on the ability of the DA's office to effectively and efficiently perform its responsibilities to the public. Given the important nature of Frank's expression, and the failure to demon-

strate a state interest that outweighs her First Amendment rights, the balance must be struck for Frank. Therefore, her speech was constitutionally protected.

To prevail, plaintiff must also prove that her speech was a "substantial" or "motivating" factor in her dismissal. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977); *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 46 (2d Cir. 1983). If she satisfies that burden, defendant then has the burden of showing that he would have reached the same decision concerning plaintiff's discharge even in the absence of the protected conduct. *Doyle*, 429 U.S. at 287, 97 S.Ct. at 576.

Defendant contends that Frank's discharge was based upon her poor judgment in consulting with Pilato rather than her immediate supervisor or himself and was not in reprisal for the *content* of her speech. Although there is evidence which suggests that Frank's dismissal can only be explained as retaliation, the hearing focused upon the issue of whether her speech was constitutionally protected. In fairness, the parties should be allowed the opportunity to present additional evidence or argument on the issue of whether plaintiff's speech was a substantial factor in her dismissal. Thus, there may be questions of fact concerning whether the nature or content of Frank's speech was a substantial or motivating factor in her discharge and, ultimately, whether she was discharged in retaliation for exercise of her constitutionally protected right of freedom of expression.

Conclusion

For the reasons stated above, defendant's motion for summary judgment on plaintiff's first cause of action is denied.

IT IS SO ORDERED.

s/ David G. Larimer

DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
August 1, 1989.

APPENDIX E

Order of the United States Court of Appeals for the Second Circuit, denying petition for rehearing, dated and filed September 15, 1993.

E-1

UNITED STATES COURT OF APPEALS
FILED SEP 15 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of September one thousand nine hundred and ninety-three.

MELINDA C. FRANK,
Plaintiff-Appellant,

V

HOWARD R. RELIN, Individually and in his official capacity as the Monroe County District Attorney,
Defendant-Appellee.

DOCKET NUMBER: 92-9026(L)
93-7060

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Defendant-Appellee HOWARD R. RELIN.**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
By: s/ Carolyn Clark Campbell

Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX F

Mandate of the United States Court of Appeals for the Second Circuit, vacating the district court judgment and remanding to the district court for further proceedings, dated and filed July 28, 1993 and issued September 30, 1993.

MANDATE
United States Court of Appeals
FOR THE
SECOND CIRCUIT

WDNY
86-cv-371
LARIMER

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of July, one thousand nine hundred and ninety-three.

PRESENT: HON. JON O. NEWMAN, Chief Judge*,
HON. WILFRED FEINBERG,
HON. AMALYA L. KEARSE, *Circuit Judges.*

UNITED STATES COURT OF APPEALS
FILED JUL 28 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

MELINDA C. FRANK,
Plaintiff-Appellant,

-v.-

92-9026
93-7060

HOWARD R. RELIN, Individually and in his official capacity as the Monroe County District Attorney,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

UPON CONSIDERATION THEREOF, it is ORDERED, ADJUDGED and DECREED that the Judgment of said district court is vacated and the action be and it hereby is remanded to the district court for further proceedings not inconsistent with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk
By:
s/ Edward J. Guardaro

Edward J. Guardaro
Staff Attorney

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
By s/ Kathy Brown
.....
Deputy Clerk

* Honorable Jon O. Newman became Chief Judge on July 1, 1993.

ISSUED AS MANDATE.
9-30-93

Supreme Court, U.S.
FILED
NOV 12 1993
OFFICE OF THE CLERK

No. 93-654

In The

Supreme Court of the United States

October Term, 1993

HOWARD R. RELIN, Individually,

Petitioner,

vs.

MELINDA C. FRANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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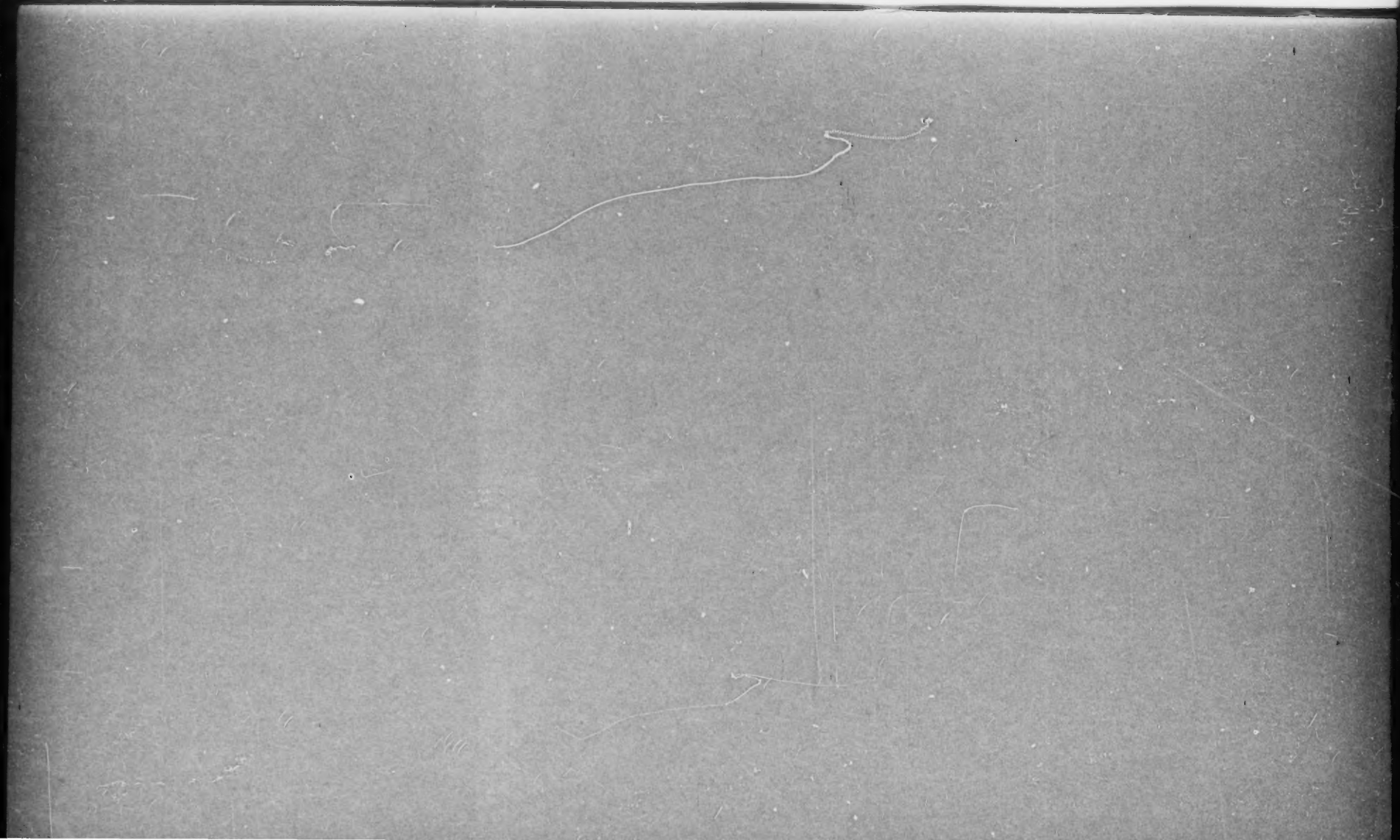

QUESTIONS PRESENTED

1. Whether a writ of certiorari is appropriate where the Court of Appeals correctly applied established precedent regarding qualified immunity, including the objective reasonableness test?

2. Whether a writ of certiorari is appropriate where the Court of Appeals' decision turned on summary judgment principles, and not on qualified immunity principles?

3. Whether a writ of certiorari is appropriate to review an issue never reached by the Court of Appeals below?

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STATEMENT OF THE CASE

The court below, the United States Court of Appeals for the Second Circuit, reversed a grant of summary judgment dismissing respondent's complaint. *Frank v. Relin*, 1 F.3d 1317 (2d Cir. 1993). Petitioner seeks review of the Second Circuit's decision by writ of certiorari. This brief is submitted on behalf of respondent in opposition to the petition for certiorari.

Respondent was employed by the Monroe County District Attorney's Office as victim witness coordinator. (Appendix A-3) Petitioner was the District Attorney. (*Id.*) In 1985, in the course of preparing witnesses in two cases, respondent was advised not to explore or investigate potentially exculpatory information which had come to her attention. Concerned about the implications of this advice, respondent spoke to a senior Assistant District Attorney in petitioner's office. (Appendix A-4-5) That Assistant District Attorney in turn brought this information to the attention of the supervisory judge of Monroe County criminal courts. When petitioner later learned what happened, he demanded respondent's resignation. (Appendix A-7)

In April of 1986, respondent commenced the instant action alleging two claims against petitioner in his official capacity under 42 U.S.C. §1983[1]; the claim pertinent to the instant appeal alleged that respondent's firing violated her First Amendment rights to speak on matters of public concern. (Appendix A-9) Following discovery, petitioner moved for summary judgment on the grounds that respondent's speech was not protected by the First Amendment. After a three-day hearing, the district court denied petitioner's motion for summary judgment ruling that respon-

[1] Respondent's second claim, that petitioner had deprived her of a property interest without due process of law, has been dismissed from the lawsuit, and was neither a subject of the Second Circuit's decision, nor the instant petition for certiorari.

dent's speech was about matters of public concern, and further that her speech outweighed petitioner's interest in the efficient administration of his office.

Thereafter, petitioner sought to raise the defense of qualified immunity by amending his answer. As directed by the district court, respondent first amended her complaint alleging a cause of action against petitioner individually. Petitioner then moved for summary judgment on grounds of qualified immunity and, notwithstanding its prior decision denying petitioner's original motion for summary judgment, the district court then granted summary judgment on the grounds of qualified immunity, and dismissed respondent's complaint in its entirety. (*See* Appendix B-1-16)

Respondent appealed to the United States Court of Appeals for the Second Circuit which held that the district court erred in granting summary judgment, because "the existence of fact issues made summary judgment inappropriate with respect to [petitioner's] qualified immunity defense . . . ." *Frank v. Relin*, 1 F.3d 1317, 1325 (2d Cir. 1993) (Appendix A-16) Accordingly, the Court of Appeals reversed the grant of summary judgment and remanded the case for further proceedings. Petitioner sought a re-hearing, but his application was denied. This petition for a writ of certiorari followed.

SUMMARY OF THE ARGUMENT

1. The opinion below did not break new ground, nor did it deviate from established precedent. Rather, the Court of Appeals applied This Court's objective reasonableness test under *Anderson v. Creighton*, 483 U.S. 635 (1987). Furthermore, there is no conflict among the circuits. Although petitioner cites cases from other circuits which have reached different results, those decisions resulted from different facts, and not the application of any different qualified immunity standard.

2. The Court of Appeal's opinion turned on summary judgment principles, not on qualified immunity principles. In short, the Court of Appeals merely held that the district court had engaged in impermissible fact finding.

3. Petitioner's second point, that respondent's claim is barred by the applicable statute of limitations, was never addressed by the Court of Appeals. In the absence of an opinion below, there is clearly no conflict among the circuits justifying certiorari. *See* Sup.Ct.R. 10(a).

ARGUMENT

POINT I

A WRIT OF CERTIORARI IS INAPPROPRIATE BECAUSE THE SECOND CIRCUIT CORRECTLY APPLIED ESTABLISHED PRECEDENT, INCLUDING THE OBJECTIVE REASONABLENESS TEST.

Contrary to statements in the petition for certiorari, the Second Circuit did not disregard precedent, nor did the opinion below break new ground. Rather, applying established law to the particular facts of this case, the Second Circuit merely held that, "there are questions of fact as to the reasons [petitioner] fired [respondent] and those questions affect both the merits and the qualified immunity defense." *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir. 1993) (Appendix A-26). Accordingly, because the Second Circuit opinion does nothing more than apply established precedent to the facts of this case, a writ of certiorari is inappropriate herein.

Quoting extensively from the district court opinion, petitioner suggests that the Court of Appeals failed to apply This Court's objective reasonableness test under *Anderson v. Creighton*, 483 U.S. 635 (1987). This is simply incorrect. The Second Circuit

opinion specifically states that petitioner was entitled to qualified immunity, "if it was objectively reasonable for the official to believe that his acts did not violate [respondent's] clearly established [first amendment] rights." *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir. 1993) (citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)) (Appendix A-23). Similarly, the Court of Appeals went on to state that, "even where the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was *objectively reasonable* for him to believe that his acts did not violate those rights." *Frank v. Relin, supra* at 1328 (Appendix A-24) (emphasis added). Thus, the Court of Appeals cited and applied the identical law which is quoted in the petition for certiorari from the district court's opinion.

Similarly, petitioner's efforts to create a conflict among the circuits should be rejected, because petitioner's brief mischaracterizes not only the opinion below, but the purportedly conflicting decisions from other circuits. In *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989), the Court of Appeals held that defendants were entitled to qualified immunity for the firing of plaintiff. In applying the *Pickering* balancing test (*see Pickering v. Board of Education*, 391 U.S. 563 (1968)), the Eleventh Circuit concluded that, "the insulting nature of [plaintiff's] words gives his speech an element of personal as opposed to public interest." *Id.* at 1324. On the other hand, defendant was entitled to maintain loyalty, discipline and good working relationships among his employees. Therefore, under *Pickering* it could not be said that plaintiff's firing violated clearly established principles of law, and defendant was entitled to qualified immunity.

In the instant case, the Second Circuit applied the same qualified immunity analysis to the same *Pickering* balancing test. The result was different because the facts were entirely different.

"First, [respondent's] speech plainly centered on a matter of societal importance." *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir. 1993) (Appendix A-26). Contrary to the speech in *Dartland, supra*, which became personal in nature, plaintiff's speech in the instant case concerned whether relevant and material evidence was fully developed and made available to the prosecution and the defense, to enable defendants to obtain a fair trial.

On the other side of the scale, the Second Circuit held that petitioner could not establish, on the instant record, that respondent's firing was for legitimate reasons — namely, to promote office efficiency. "If the reason for the ADA's desire to be rid of [respondent] were a lack of trust in her ability or willingness to remain silent about *Brady* violations, office efficiency or morale grounded on such considerations could not outweigh [respondent's] speech, and a competent public official could not reasonably believe that it would." *Id.* at 1330 (Appendix A-28-29).

Therefore, the results in *Dartland, supra*, and the instant case, are different not because the two circuits applied different principles of law, but because the different facts in the two cases mandated different results. Under these circumstances, a writ of certiorari is inappropriate.

POINT II

A WRIT OF CERTIORARI IS INAPPROPRIATE BECAUSE THE SECOND CIRCUIT'S DECISION TURNED ON SUMMARY JUDGMENT PRINCIPLES, AND NOT ON QUALIFIED IMMUNITY PRINCIPLES.

Petitioner's argument must be evaluated in the procedural context of the case below. The district court dismissed plaintiff's complaint on the grounds of qualified immunity in response to petitioner's motion for summary judgment. On appeal, the Second Circuit reversed, ruling that, "the existence of fact issues

made summary judgment inappropriate with respect to [petitioner's] qualified immunity defense . . . ." *Frank v. Relin, supra* at 1325 (Appendix A-16).

The inappropriateness of summary judgment can be demonstrated by reference to a citation in the petition for certiorari. Petitioner quotes the district court which found that respondent's decision to speak out, "adversely affected the working relationships in the District Attorney's Office." (Petition for certiorari at 5; *see* Appendix B-13.) The Second Circuit correctly stated that the district court's, "attribution of respondent's firing to a desire to obtain office efficiency constitutes a finding of fact as to [petitioner's] motivation." *Frank v. Relin, supra* at 1330 (Appendix A-29). Furthermore, this finding directly contradicted a prior finding of the district court in its 1989 decision, which followed a three-day hearing on petitioner's initial motion for summary judgment. At that time, the district court concluded that there was, "no demonstration that [petitioner's] voicing of her concerns . . . seriously impaired her working relationship with other staff and attorneys in the office." (Appendix D-11.)

Contrary to petitioner's suggestion, the objectively reasonable qualified immunity test is not a license for district courts to engage in fact finding. Application of the qualified immunity doctrine requires that the court, "know what the facts were that the officer faced or perceived." *Warren v. Dwyer*, 906 F.2d 70, 77 (2d Cir.) (Winter, J. dissenting), *cert. denied*, 111 S.Ct. 431 (1990). In other words, the defense of qualified immunity applies where the facts are uncontested, but where the applicable law was unclear. On the other hand, where the law was clear, but the facts are in dispute, summary judgment cannot be granted on the basis of qualified immunity.

The Second Circuit's opinion turned on application of long standing and universally recognized summary judgment princi-

ples, not on any novel interpretation of qualified immunity doctrine. Accordingly, a writ of certiorari is inappropriate herein.

POINT III

A WRIT OF CERTIORARI IS INAPPROPRIATE TO REVIEW AN ISSUE NOT REACHED BY THE COURT OF APPEALS.

The second point in the petition for certiorari alleges that plaintiff's amended complaint naming petitioner in his individual capacity is barred by the statute of limitations. This issue was never addressed by the Court of Appeals. Although petitioner states that the argument was raised in his Second Circuit brief, it was never properly before the Court of Appeals.

Petitioner raised this argument in a motion to dismiss respondent's amended complaint. The motion was denied by the district court twice, first on the original motion and then on reargument. Later, when the district court dismissed plaintiff's amended complaint on grounds of qualified immunity, petitioner never cross-appealed to enable the Court of Appeals to consider the issue. Thus, the Court of Appeals' extensive opinion is silent as to this question.

Inasmuch as this issue was never addressed by the Court of Appeals, there is no conflict among the circuits justifying a writ of certiorari. *See* Sup.Ct.R. 10(a). Accordingly, the petition for certiorari should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: November 8, 1993

Respectfully submitted,

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